153 U S 380

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153-380

RECORD, CASE No. 14,220.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 221.

ADELINE B. MARCHANT, ADMINISTRATRIX OF EDWARD D. MARCHANT, DECEASED, PLAINTIFF IN ERROR,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

IN ERROR TO THE COURT OF COMMON PLEAS NO. 3 FOR THE COUNTY OF PHILADELPHIA, STATE OF PENNSYLVANIA.

FILED OCTOBER 7, 1890.

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1 *Exemplification.*

PHILADELPHIA COUNTY, } *sct:*
State of Pennsylvania, }

Among the records and proceeding- of the court of common pleas No. 3 for the county of Philadelphia, State of Pennsylvania, the following may be found as matter of file and of record at No. 133 of Sept'r term, 1884, to wit:

Docket Entries, September Term, 1884.

EDWARD D. MARCHANT
vs.
THE PENNSYLVANIA RAILROAD COMPANY. } 133.

Vanzandt. W. MacVeagh. See writ.
Sum's case. Exit Oct. 25, 1884; ret. 1 Mon. Nov., 1884. Service accepted.
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M'ch 8, 1887.—Bill of exceptions filed.
June 9, 1887.—Jury fee paid.
Eo die.—Judgment.
2 June 14, 1887.—Writ of error brought into office (S. C., July, '87, 142).
Dec. 21, 1887.—Record certified for S. C.
April 11, 1888.—Record returned and remittatur from S. C. filed certifying judgment reversed.
Eo die.—Certified copy of opinion of S. C. filed.
Ap'l 5, 1890.—Suggestion of death of pl't'ff and substitution of executrix filed.
Ap'l 5, 1890.—Writ of error from S. C. of U. S. brought into office.
Eo die.—Bond surwrit of error in $500 filed.
Ap'l 21, 1890.—Certified copy of dissenting opinion by Sterrett, J., filed.
Ap'l 29, 1890.—Certified copy of writ of error filed.
Eo die.—Acknowledgment of service of citation and waiver of return filed.

EDWARD D. MARCHANT
vs.
THE PENNSYLVANIA RAILROAD COMPANY.

Issue summons case, ret. 1st Monday of November, 1884.

GEO. H. VAN ZANDT.

To proth. C. P.

(Endorsed:) 133. Sept. term, 1884. C. P. No. 3. Edward D. Marchant *vs.* The Pennsylvania Railroad Company. Præcipe sum's case. Filed Oct. 25, 1884. W. MacCain. Van Zandt.

3 *Summons.*

COUNTY OF PHILADELPHIA, *ss:*

The Commonwealth of Pennsylvania to the sheriff of the county of Philadelphia, Greeting:

We command you that you summon the Pennsylvania Railroad Company, late of your county, so that it be and appear before our judges at Philadelphia, at our court of common pleas No. 3 for the county of Philadelphia, to be holden at Philadelphia, in and for the said county of Philadelphia, the first Monday of November next, there to answer Edward D. Marchant of a plea of trespass on the case, etc., and have you then there this writ.

Witness the Honorable James R. Ludlow, president of our said court, at Philadelphia, the 25th day of October, in the year of our Lord one thousand eight hundred and eighty-four.

W. MACCAIN,
Pro Prothonotary.

(Endorsed:) 133. Sept. term, 1884. Court of common pleas No. 3. Edward D. Marchant *vs.* The Pennsylvania Railroad Company. Summons case. Van Zandt.

I accept service of the within writ for The Pennsylvania Railroad Company, defendant. The prothonotary will please enter my appearance for the defendant.

WAYNE MACVEAGH.

Oct. 28, 1884.

4 EDWARD D. MARCHANT
vs.
THE PENNSYLVANIA RAILROAD COMPANY.
C. P. No. 3. 133. S. T., 1884.

COUNTY OF PHILADELPHIA, *ss:*

The Pennsylvania Railroad Company, the defendant in this case, late of the county aforesaid, were summoned to answer Edward D. Marchant, plaintiff in this case, of a plea of trespass on the case, and thereupon the said plaintiff, by Geo. H. Van Zandt, Esqr., his attorney, complains:

For that whereas the said plaintiff on, to wit, the first day of June, A. D. 1881, and from then until, to wit, the seventh day of October; A. D. 1882, was lawfully possessed in his demesne as of fee of and in all that certain four-story brick messuage or tenement, partly brownstone front, and lot or piece of ground situate on the north side of Filbert street at the distance of ninety-eight feet westward from the west side of Seventeenth street, in the Ninth ward of the city of Philadelphia, containing in front on Filbert street twenty feet and extending of that width in length or depth northward between parallel lines at right angles with the said Filbert street one hundred and seventeen feet to Cuthbert street; and the said plaintiff in fact says that the said Filbert street on, to wit, the date first aforesaid, was and from thence hath been and still is a public highway of the said city of Philadelphia duly laid out, graded, curbed, and paved at, to wit, twenty-four feet in width from curb to curb.

And the said plaintiff in fact further says that the said defendant on the day and year first aforesaid was and still is a corporation duly incorporated under the laws of this Commonweath and as such is invested with the privilege of taking private property
5 for public use.

And the said plaintiff further says that afterwards, to wit, on the day and year first aforesaid, at the city and county aforesaid, the said defendant did, on the construction and enlargement of its works, highways, and improvements, erect, build, and construct along and upon the south side of Filbert street aforesaid and in front of said premises of said plaintiff, abutting thereon as aforesaid, an elevated railroad placed on piers or abutments set on or about the line of the south side of Filbert street aforesaid at intervals longitudinally of fifty feet, more or less, and on an elevation of, to wit, twenty feet above the established grade of Filbert street aforesaid, which said elevated railroad further westward, built upon piers or pillars, extends across said Filbert street to the curb line on the north side thereof, making a part of a continuous line of railway.

And the said plaintiff in fact says that the said defendant from, to wit, the day and year first aforesaid, have operated and used and still do operate and use for the purposes of the transportation of goods and passengers in cars driven and drawn by steam locomotives the said elevated railroad as part of a continuous line of railway, to wit, at the city and county aforesaid.

And the said plaintiff further says that the erection, building, and construction by the said defendants of the elevated railroad aforesaid and in the manner aforesaid, and the erection and construction of the abutments, piers, and pillars as aforesaid for the support of the superstructure aforesaid, and the operation and use of the said elevated railroad for the transportation of freight and passengers in railway cars driven by steam locomotives, and the noise, burning cinders, smoke, dirt, dust, and jarring incident to the operation and use of an elevated railroad constructed as aforesaid for the purposes as aforesaid, injured the said plaintiff in the
6 possession, use, and enjoyment of his premises and property

aforesaid and rendered the same incommodious, unfit, and of little or no use and value to the said plaintiff, darkened the premises of the said plaintiff and hindered the light and air from coming, entering into, and through the windows of said dwelling, so that the same was rendered uncomfortable, unwholesome, and unfit for a habitation, and injured and incommodied the plaintiff in the enjoyment thereof and in the conduct of his business of a painter and depreciated the value of said premises and deprived him of the free use along and upon Filbert street as a highway as aforesaid and greatly depreciated the value of said premises while he was so possessed of the same, to wit, from the day and year aforesaid til-, to wit, October seventh, A. D. 1882, all of which resulted in a sheriff's sale of said premises far below their value before the erection and operation of said elevated railroad and far below what the said premises were at that time worth and would have brought had the said premises not have been injured as aforesaid by the construction of said railroad and operation of the same.

And also for that whereas the said plaintiff before and at the time of the committing of the grievances hereinafter mentioned was and from thence until, to wit, October 7, 1882, lawfully possessed in his demesne as of fee of a certain other messuage and premises, with the appurtenances, situate on the north side of Filbert street at the distance of ninety-eight feet westward from the west side of Seventeenth street, in the 9th ward of the city of Philadelphia, containing in front on said Filbert street 20 feet and extending of that width in length or depth northward between parallel lines at right angles with the said Filbert street one hundred and seventeen feet to Cuthbert street, the said Filbert street being a public highway, and by reason thereof the said plaintiff during all the
7 time aforesaid ought to have had the undivided privilege and right of way of the said certain public highway, Filbert street aforesaid, for himself and his servants to go, return, pass, and repass every year and at all times of the year at his and their free will and pleasure to and from the said messuage and premises aforesaid, and to have possessed said messuage and premises in a peaceful and quiet manner, free from injury or any annoyance or inconvenience from the building and operating of an elevated railroad; yet the said defendant, well knowing the premises, but wrongfully and unjustly continuing to injure the said plaintiff in that behalf and deprived him of the use and benefit of the said highway whilst the said plaintiff was so possessed of his said messuage, with the appurtenances, as aforesaid, to wit, on the 1st day of June, A. D. 1881, and at all times thereafter, while the said plaintiff was so possessed of said premises, at the county aforesaid, wrongfully and injuriously placed and erected and caused to be placed and erected a certain railroad, known as an elevated railroad, on piers or abutments set on and along the line of the south side of said Filbert street in front of the plaintiff's premises, on the north side of said street, the tracks of said railroad being at, to wit, 20 feet above the existing grade of said Filbert street, which said elevated railroad further westward, built upon piers or pillars, extends across said Filbert street to the

north side thereof, making a part of a continuous line of railway; and kept and continued said elevated railroad so placed and elevated as aforesaid for a long space of time, to wit, hitherto, and thereby during all the time aforesaid the said highway was and still is greatly obstructed and stopped up. The cross-streets intersecting were and are obstructed, the railroad passing over the same on arches. The street itself, in front of the premises of which
8 the plaintiff was possessed, — filled with dust, smoke, sparks, noise, and hiss of steam escaping from engines on said railroad, the ringing of bells and whistling of said engines, the noise of passing train of cars and the shunting of cars on said railroad near said property; all of which injured the walls of the house on said premises, disturbed the rest of the plaintiff and his family by night and their peace by day, broke up the plaintiff's business as an artist, and destroyed its use as a resting and boarding place for sick persons carried on therein, and by reason thereof — was deprived of the use, benefit, and advantage thereof that he otherwise would have had and enjoyed, as he before that time had enjoyed, which eventually resulted in a sheriff's sale of said premises, greatly to the said plaintiff's loss and injury.

Wherefore the said plaintiff saith that he is injured and hath sustained damages to the amount of fifty thousand dollars, and therefore he brings his suit.

GEO. H. VAN ZANDT,
Att'y for Pl'ff.

To proth'y C. P.

(Endorsed:) C. P. No. 3. 133. S. T., 1884. Ed. Marchant *vs.* Penna. R. R. Co. *Narr.* Filed March 10, 1885. Enter rule on defendant to plead in 8 days, or judgment *sec. leg.* Geo. H. Van Zandt. To proth. C. P.

9 EDWARD D. MARCHANT *vs.* PENNSYLVANIA RAILROAD COMPANY. } C. P. 3, Sept. T., 1884. No. 133.

First. The defendant pleads not guilty.

Second. And for a further plea in this behalf the defendant says that the plaintiff ought not to have or maintain his aforesaid action because it says that it, the said company defendant, prior to the adoption of the present constitution of this Commonwealth was duly created a corporation or body politic in law by act of assembly of the Commonwealth of Pennsylvania, approved the thirteenth day of April, A. D. 1846 (to which act of assembly defendant hereby craves leave to refer), by the seventeenth section whereof it is provided (*inter alia*) as follows:

"And it shall be lawful for the said company (meaning the Pennsylvania Railroad Company aforesaid) in the manner and subject to the conditions and provisions hereinbefore provided in relation to the main line of their railroad by this act authorized to be made to make such lateral railroads or branches leading from the main

line of their railroad to such convenient place or points in either of the counties into or through which the said main line of their railroad may pass, as the president and directors may deem advantageous and suited to promote the convenience of the inhabitance thereof and the interests of said company;" and afterwards, to wit, on the sixteenth day of May, A. D. 1857, by an act of the General Assembly of the Commonwealth of Pennsylvania entitled "An act for the sale of the main line of the public works," and approved the day and year last aforesaid, it was provided (*inter alia*) "that and company already incorporated by this Commonwealth becoming the purchaser of said main line shall possess, hold, and use
10 the same under the provisions of their act of incorporation and any supplement thereto, modified, however, so as to embrace all the privileges, restrictions, and conditions granted by this act in addition thereto;" and afterwards, to wit, on the first day — August, A. D. 1857, the said main line of the public works was purchased by the said defendant, The Pennsylvania Railroad Company, and the said company, by virtue of the said purchase and under and by virtue of the provisions of the act of assembly last aforesaid, became entitled to have, exercise, and enjoy over the said property so purchased, including the railroad from Columbia to the city of Philadelphia, all the rights, powers, and privileges which under and by virtue of the said act of incorporation they were entitled to have and did have, exercise, and enjoy over the property and railroad of it, the said company defendant, between the cities of Pittsburg and Harrisburg, in the said State; and the said defendant in fact further saith that the said railroad, bridges, and other buildings and structures and improvements in the said declaration mentioned constituted in no other sense an elevated railroad than as such elevation of grade was necessary in crossing the Schuylkill river and passing overhead and leaving travel unobstructed on the largely travelled streets of Philadelphia intervening between and including Fifteenth and Twenty-fourth streets, and were built, erected, and constructed and were and still are used and operated by the said defendant only, under and by virtue of the aforesaid act of assembly approved April 13, 1846, and May 15, 1857, without this, that the said defendant, by the construction and use of the said railroad bridges and other structures in the said declaration mentioned, has wrongfully injured and damnified the plaintiff in manner and form as is in the said declaration set forth; and this the defendant is ready to verify.

11 Third. And for a further plea in this behalf the defendant says that the plaintiff ought not to have or maintain his aforesaid action because it says that it, the said company defendant, prior to the adoption of the present constitution of this Commonwealth was duly created a corporation or body politic in law by act of assembly of the Commonwealth of Pennsylvania approved the thirteenth day of April, A. D. 1846 (to which act of assembly defendant hereby craves leave to refer), by the seventeenth section whereof it is provided (*inter alia*) as follows: "And it shall be lawful for the said company" (meaning the Pennsylvania Railroad Com-

pany aforesaid), "in the manner and subject to the conditions and provisions hereinbefore provided in relation to the main line of their railroad by this act authorized to be made, to make such lateral railroads or branches leading from the main line of their railroad to such convenient place- or points in either of the counties into or through which the said main line of their railroad may pass as the president and directors may deem advantageous and suited to promote the convenience of the inhabitants thereof and the interests of said company." And afterwards, to wit, on the sixteenth day of May, A. D. 1857, by an act of the General Assembly of the Commonwealth of Pennsylvania entitled "An act for the sale of the main line of the public works" and approved the day and year last aforesaid it was provided (*inter alia*) as follows:

"And it shall be lawful for the purchasers to straighten and improve the said Philadelphia and Columbia railroad and extend the same to the Delaware river into the city of Philadelphia." And afterwards, to wit, on the first day of August, A. D. 1857, the said main line of the public works was purchased by the said defendant, The Pennsylvania Railroad Company, and the said company, by virtue of the provisions of the act of assembly last
12 aforesaid and by virtue of the said purchase, became entitled to straighten and improve the said Philadelphia and Columbia railroad and extend the same to the Delaware river, in the city of Philadelphia, and the defendant in fact further saith that the said railroads, bridges, and other buildings, structures, and improvements in the said declaration mentioned constituted in no other sense an elevated railroad then as such elevation of grade was necessary in crossing the Schuylkill river and passing overhead and leaving travel unobstructed on the largely travelled streets of Philadelphia intervening between and including Fifteenth and Twenty-first Sts., and were built and erected and constructed and were and still are used and operated by the said defendant only under and by virtue of the rights, powers, and privileges conferred upon said defendant by virtue of said section of said last-mentioned act; without this, that the said defendant wrongfully and injuriously did construct and use the said railroad bridges and other structures in the said declaration mentioned to the injury and damage of the said plaintiff, as in the said declaration alleged, and this the said defendant is ready to verify.

WAYNE MacVEAGH,
B., *Att'y for Defendant.*

March 11th, 1885.

(Endorsed:) No. 133. Sept. term, 1884. C. P. 3. Edward D. Marchant *v.* The Penna. R. R. Co. Special pleas. Filed Mar. 11, 1885. J. Brigg.

13 EDWARD D. MARCHANT
vs.
THE PENNSYLVANIA RAILROAD COMPANY. } C. P. No. 3, Sept. T., 1884. No. 133.

CITY AND COUNTY OF PHILADELPHIA, *ss:*

And now comes the said plaintiff, by leave of the court for that purpose first had and obtained, and amends the declaration heretofore filed in this cause by filing the following as an additional count thereto, namely:

And also for that whereas the said plaintiff heretofore, to wit, on the twenty-seventh day of September, A. D. 1882, at the city and county aforesaid, was lawfully possessed in his demesne as of fee of a certain lot or piece of ground, with the four-story brick messuage or tenement thereon erected, situate and abutting on the north side of Filbert street, at the city and county aforesaid, at the distance of ninety-eight feet westward from the west side of Seventeenth street, in the Ninth ward of the said city of Philadelphia, containing in front or breadth on said Filbert street twenty feet and extending of that width in length or depth northward between parallel lines at right angles with the said Filbert street one hundred and seventeen feet to Cuthbert street.

And the said plaintiff in fact says that the said Filbert street at the point aforesaid is a public highway of the said city of Philadelphia, duly laid out, graded, curbed, and paved.

And the said plaintiff in fact further saith that the said defendant is a corporation duly incorporated under the laws of this Commonwealth, and as such is invested with the privilege of taking private property for public use.

And the said plaintiff in fact further saith that afterwards, to wit, on the day and year aforesaid, the said defendant did, in the
14 construction and enlargement of its works, highways, and improvements, erect, build, and construct on the south side of said Filbert street and abutting thereon and opposite said plaintiff's property aforesaid an elevated railroad placed on stone and brick arches at an elevation of at least twenty feet above the established grade of Filbert street aforesaid, which the said defendant operated and used and still doth operate and use for the purpose of the transportation of freight and passengers in railway cars driven and drawn by steam locomotives, to wit, at the city and county aforesaid.

And the said plaintiff further saith that the erection, building, and construction by the said defendants of the elevated railroad aforesaid at the place aforesaid and in the manner aforesaid, and the operation and use of the said elevated railroad for the transportation of freight and passengers in railway cars driven and drawn by steam locomotives, and the noise, burning cinders, smoke, dust, and dirt incident to the operation and use of an elevated railroad constructed as aforesaid for the purposes as aforesaid injured the said plaintiff in the possession, use, and enjoyment of his premises and property aforesaid, and rendered the same incommodious, unfit, and of little or no use or value to the said plaintiff either as a

dwelling-house or otherwise, and depreciated the value of said premises, and deprived the said plaintiff of the free and undisturbed use along and upon Filbert street as a highway as aforesaid.

Wherefore the said plaintiff saith that he was disturbed and annoyed, injured and prejudiced in the possession, use, occupation, and enjoyment of the said premises, with the appurtenances, and hindered and prevented from occupying and enjoying the same in so ample and beneficial a manner as he otherwise might have done, and other wrongs to the said plaintiff then and there done,
15 and he sustained damage to the amount of twenty thousand dollars, and therefore he brings suit, &c.

GEORGE H. VAN ZANDT,
M. HAMPTON TODD,
Att'ys pro Pl'ff,

Per S.

To proth'y of com. pl's c'ts.

M'ch 12, '86.

(Endorsed:) 133. Sept. T., 1884. C. P. No. 3. Edward D. Marchant *vs.* The Pennsylvania Railroad Company. Amended *narr.* Enter rule to plead in eight days or judgment *sec. reg.* George H. Van Zandt, M. Hampton Todd, att'ys *pro* pl'ff, per S. To proth'y of com. pl's c'ts. M'ch 13, '86. Filed Mar. 13, 1886. J. Brigg.

EDWARD D. MARCHANT *vs.* THE PENNA. RAILROAD CO. } C. P. No. 3., September Term, 1884. No. 133.

To the amended *narr.* the defendant pleads the three pleas hereinbefore filed.

WAYNE MACVEAGH,
For Defendant.

M'ch 16th, 1886.

To the prothonotary.

(Endorsed:) No. 133. Sept. term, '84. C. P. No. 3. Edward D. Marchant *v.* The Penna. R. R. Co. Pleas. Filed Mar. 16, 1886. J. Briggs. MacVeagh.

16 EDWARD D. MARCHANT *vs.* THE PENNSYLVANIA RAILROAD COMPANY. } C. P. No. 3, Sept. T., 1884. No. 133.

The said plaintiff, as to the plea of the said defendant by it first above pleaded, replies similiter issue.

And the said plaintiff, as to the plea if the said defendant by it secondly above pleaded, says he ought not to be barred from having and maintaining his aforesaid action against the defendant by reason of anything in said plea alleged, because he says that the said defendant at the said time when, &c., of its own wrong and without

the cause by it in said second plea alleged by the construction and use of the said elevated railroad, bridge, and other structures in the said declaration mentioned wrongfully injured and damnified the said plaintiff in manner and form as is in the said declaration set forth; and this he prays may be inquired of by the country, &c.

And the said plaintiff, as to the plea of the said defendant by it thirdly above pleaded, says he ought not to be barred from having and maintaining his aforesaid action against the defendant by reason of anything in said plea alleged, because he says that the said defendant at the said time when, &c., of its own wrong and without the cause by it in said third plea alleged wrongfully and injuriously did construct and use the said elevated railroad and other structures in the said declaration mentioned, to the injury and damage of the said plaintiff, as is in the said declaration alleged; and this he prays may be inquired of by the country, &c.

GEORGE H. VAN ZANT,
M. HAMPTON TODD,
Att'ys pro Pl'ff,

Per S.

To proth'y of com. pl's c'ts.

M'ch 19, '86.

17 (Endorsed:) 133. Sept. T., 1884. C. P. No. 3. Edward D. Marchant *vs.* The Penna. Railroad Co. Replication. Mar. 19, 1886. Van Zant, M. H. Todd.

S., '84. No. 133.

FRIDAY, *Nov. 5th*, 1886.

Coram Judge Finletter.

EDWARD D. MARCHANT
vs.
THE PENNA. RAILROAD CO.

And now, a jury being called, came the persons following, to wit, Arthur F. Connelly, Herman Reppe, George H. Hansbury, Wm. Mason, Wm. Harrington, Lewis Hartzook, Wm. C. Hibbs, Ed. B. Ott, Chas. Kelley, Jno. Manuel, Chas. E. Wilkinson, Wm. A. Farrell, who, being duly empannelled and qualified, find a verdict for plaintiff for $4,960.00.

Judgment Index.

MARCHANT
v.
R. R. Co.
C. P. 3, S., '84. No. 133.

Nov. 8, 1886.

Reversed.
Defendant: Pennsylvania railroad.
Plaintiff: E. D. Marchant.
Court: 3.

18 Term: September, 1884.
No.: 133.
Attorney: Todd.
Date: November 8.
Verdict: ——.
Amount: $4,980.

Motion and Reasons for New Trial.

EDWARD D. MARCHANT
vs.
PENNA. RAILROAD COMPANY. } C. P. 3, September Term, 1884. No. 133.

And now, November 11th, 1886, MacVeagh, for defendant, moves for a rule for a new trial and assigns the following reasons:

1. Because the damages established by the verdict were excessive.

2. Because the learned court erred in refusing to affirm
19 the first point of the defendant; which point was as follows:

"The defendant, under its charter and supplements in evidence, had full lawful authority to erect and operate Filbert-street extension or branch described in the declaration, without incurring any liability by reason thereof for consequential damages to the property of the plaintiff, the uncontradicted evidence being that none of the said property was taken by the defendant, but that the entire width of Filbert street intervenes between the railroad of the defendant and the nearest point thereto of the property of the plaintiff."

3. Because the learned court erred in refusing to affirm the second point of the defendant, which point was as follows:

"The defendant, as purchaser of the main line of the public works of this State, under the acts of assembly and deed in evidence, had full lawful authority to erect and operate the said Filbert-street extension or branch without incurring any liability to the plaintiff for alleged consequential damages to his property, the uncontradicted evidence being that none of the said property was taken by the defendant, but that the entire width of Filbert street intervenes between the railroad of the defendant and the nearest point thereto of the property of the plaintiff."

20 4. Because the learned court erred in refusing to affirm the third point of the defendant, which point was as follows:

"The contracts contained in the charter of the defendant and the supplements thereto in evidence, as well as the contract contained in the acts of assembly and deed for the main line, already mentioned, authorized the defendant to construct said extension or branch with liability for property taken only, and no subsequent legislation by this State can impair the obligation of those contracts or either of them by increasing the price of the exercise of the franchises granted by imposing an obligation to pay for property alleged to be injured but not alleged to have been taken."

5. Because the learned court erred in refusing to affirm the fourth point of the defendant, which point was as follows:

"The property of the plaintiff being separated from the railroad of the defendant by the entire width of Filbert street, a public highway of the city of Philadelphia, of the width of 51 feet, there is no liability on the part of the defendant for alleged consequential damages to said property."

6. Because the learned court erred in refusing to affirm the fifth point of the defendant, which point was as follows:

21 "The uncontradicted evidence being that the property of the plaintiff is situated on the north side of Filbert street, a public highway of the city of Philadelphia, on the opposite side from the railroad of the defendant, which does not occupy any part of said street opposite the property of the said plaintiff, and is erected wholly on its own property, being a distance of 51 feet therefrom, and there being no evidence that any of the property of the plaintiff was taken, injured, or destroyed by the construction of the said Filbert Street extension or branch, the verdict must be for the defendant."

7. Because the learned court erred in refusing to affirm the sixth point of the defendant, which point was as follows: "The plaintiff's property being situated in a thickly built portion of the city of Philadelphia and upon the opposite side of a frequented public highway, the defendant is not responsible for the consequences to the plaintiff's property of the proper and careful operation of its road."

8. Because the learned court erred in refusing to affirm the seventh point of the defendant, which point was as follows: "Under all the evidence the verdict should be for the defendant."

Endorsed: 133. Sept. term, 1884. C. P. 3. Edward D. Marchant *v.* Penna. R. R. Co. Motion for rule for a new trial & reasons. Nov. 11, '86. Filed Nov. 5, '86. Finletter, J. McVeagh.

22 TUESDAY, *Dec.* 7, 1886.

Monday, Dec. 6, 1886.

New Trial Motions.

Marchant *vs.* R. R. Co. S. '84. 133. Rule granted.

MONDAY, *December* 20, 1886.

New Trial Argument List.

Marchant *v.* R. R. Co. S. '84. 133. Rule discharged.

23 *Bill of Exceptions.*

Be it remembered that in the term of September, A. D. 1884, came Edward D. Marchant into the court of common pleas No. 3 for the county of Philadelphia and impleaded The Pennsylvania

Railroad Company in a certain plea of trespass on the case, &c., in which the said plaintiff declared (*pro ut narr.*) and the said defendant pleaded (*pro ut pleas*); and thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the county aforesaid, before the Honorable Thomas K. Finletter, president of the said court, on Friday, the fifth day of November, A. D. 1886, the aforesaid issue between the said parties came to be tried by a jury of the said county for that purpose duly impannelled (*pro ut* list of jurors); at which day came as well the said plaintiff as the said defendant, by their respective attorneys, and the jurors of the jury aforesaid impannelled to try the said issues being also called came and were then and there in due manner chosen and sworn or affirmed to try the said issue; and upon the trial the counsel of the said parties offered in evidence the following testimony, and the learned judge charged the jury as follows:

MARCHANT
vs.
THE PENNSYLVANIA R. R. } C. P. No. 3. Finletter, J.

FRIDAY, *November 5th*, 1886.

Present: Messrs. Vansant and Todd for plaintiff, and Messrs. Wintersteen and Bispham for defendant.

Mr. TODD: We have agreed, so far as the plaintiff is concerned, first, that Filbert street between 17th and 18th is 51 feet wide from the north side of the railroad works in front of the houses opposite—that is, opposite the plaintiff's property.

Second. That the construction of the Filbert-street exten-
24 sion was begun in October, 1879, and it was completed and the road put in operation on the 5th day of December, 1881.

Third. That the average number of tra-ns going in and out of the Broad-street station passing the plaintiff's property during each day of 24 hours was 252 in 1882 and is 361 in 1886, and that the whole number of daily-train movements during the day at 17th and Filbert streets is about 1,440.

Plaintiff's counsel offer in evidence conveyance, George Holmes and wife to Edward D. Marchant, dated 4th October, 1871, in consideration of $5,500, subject to $5,500 for premises, the subject-matter of this suit; recorded in Deed Book J. A. H. No. 180, page 274.

ADELINE B. MARCHANT, having been duly sworn, was examined as follows:

By Mr. TODD:

Q. You are the daughter of the plaintiff, Mr. Edward B. Marchant?

A. Yes, sir.

Q. What is the age of your father?
A. He will be 80 the 16th of next month.
Q. Is his health good or bad?
A. Bad.
Q. You resided with him at 1711 Filbert street from the time the propetty was purchased from Mr. Holmes?
A. Yes, sir; November, 1879.
Q. You were residing there on the 6th of December, 1881?
A. Yes, sir.
Q. State to the court and jury what effect, if any, the construction and operation by the Pennsylvania railroad of the elevated road on the opposite side of the street had upon that property.
A. Upon the house alone gradually after the railroad was in operation the walls began to crack all over the house and it
25 became almost uninhabitable in that way. It cracked in a great many places. The walls were cracked and the house shook continually.
Q. At what time?
A. As trains were moving.
Q. What effect, if any, did you notice upon any of the mantel-pieces or anything of that kind in the house?
A. One of them was perfectly shaken from the wall and rendered unsafe for any valuables.
Q. What do you mean by that?
A. The continued jar caused the mantel-piece to be shaken out fully an inch and a half from the wall.
Q. With reference to cinders and trains running what effect had that upon the house as to sleeping, etc.?
A. We stayed there several years during the winter after the railroad was in operation and one summer, and we had to keep the windows closed most all the time, and even then the cinders were sifting through, as it was impossible to keep them out. The smoke and heat from the engines which stood opposite our house—three or four in a row, perhaps—for half an hour at a time made it intolerable.
Q. There was a turn-table, I believe, directly oppotite your house?
A. Yes, sir; a turn-table, and also a supply pipe of water.
Q. And the engines would come there and stand, blowing off steam?
A. Yes, sir; continually.
Q. Would you hear that on the opposite side of the street?
A. Yes, sir.
Q. How did it affect your rest at night?
A. My father as an old man could not rest at all. After three o'clock he never got any sleep, and it affected his nerves and his health. I think it would be hardly possible for even a sound
26 man to sleep comfortably under such circumstances.

Objected to.

Q. State, with respect to yourself, whether your rest was disturbed or not by the movement of trains.

A. It was.

Q. To what extent?

A. I would be awakened up occasionally in the night by a train seeming to come right in upon the end of my room. Of course that was imagination.

Q. You slept in the front part of the house?

A. Yes, sir.

Q. Facing which way?

A. Facing west.

Q. You say it seemed as if the train was coming in on you. Of course that was when you were awakened up suddenly in the night?

A. Yes, sir.

Cross-examination.

By Mr. BISPHAM:

Q. You moved there in 1879?

A. Yes, sir.

Q. How long did you continue to reside there?

A. Until the spring of 1884.

Q. What did your father's family consist of?

A. Himself, myself, and my mother.

Q. You all moved there and lived there until the spring of 1884?

A. Yes, sir.

Q. Where was your father's sleeping-room?

A. The second story back in the main building. He had formerly slept in the front of the house, but moved into the back of it.

Q. Did you notice at all whether you got accustomed to the
27 noise of the trains after awhile.

A. No; I did not.

Q. Didn't you find any difference between the time the railroad was first built and the trains first began to be operated and some time afterwards when the going and the coming of the trains would, I should suppose, be a matter which you could get used to?

A. Well, it is different, you know, from the continual rush of machinery or anything of that kind. It would stop for a few minutes, and then we would have a roar and a rush and a shriek from the engines. I think it was as bad the day we left as it was at first. I mean the effect upon us.

Q. But I speak of whether a person would not get more or less accustomed to having the noise going on and would not notice it so much. Wasn't that the fact?

A. No; we tried it for several years, and it seemed to be as bad to us when we left as it was the first day.

Q. You moved away from there in the spring of 1884?

A. Yes, sir.

Q. Have you seen the property since?

A. Yes, sir.

Q. It was afterward used as a seeed store?

A. Yes, sir.

Q. It is now used as a seed store by Mr. Maule, and was purchased by him?

A. Yes, sir.

HENRY R. GUMMEY, having been duly sworn, was examined as follows:

By Mr. TODD:

28 Q. What is your business?

A. Real-estate broker.

Q. How long have you been engaged in that business?

A. About 29 years.

Q. You are one of the firm of J. M. Gummey & Sons, and were associated with your father in business before his death?

A. I was for fifteen years. He has been dead about fifteen years.

Q. In the twenty-nine years you have been in business what opportunities have you had of becoming acquainted with the values of real estate in the different sections of the city of Philadelphia?

A. My business has been the buying and selling of real estate during the whole of that time without intermission.

Q. Exclusively in that line?

A. Exclusively real estate and real-estate securities.

Q. What have been your opportunities for knowledge with reference to property on Filbert street between Broad and the Schuylkill river?

A. I have had general knowledge of all that property during my business experience, and especially of a number of properties on that street between Broad and the river; also a number in that immediate vicinity I have had special knowledge of.

Q. Did you know the property 1711 Filbert street, owned by Mr. Marchant?

A. I did. I knew the property from the time it was built by George W. Holmes, the former owner.

Q. He sold it to Mr. Marchant in 1870 or 1871?

A. I don't remember the year exactly, but it was about that time.

29 Q. State what was the value of that property in 1879 and immediately prior to the construction of the elevated railroad opposite to it.

A. I think the pro-erty in that time was worth at least $11,000.

Q. Bring you- mind to bear upon it now, having in view the construction of that road and its effect upon property in that vicinity, and fix its value upon the 6th of December, 1881.

A. That was after the running of the road?

Q. Yes. I would state to you that it is agreed upon here that on the 5th of December, 1881, this road was completed and in full operation by the defendant company; therefore I take the 6th as being the next day after the operation.

A. I think that after the beginning of the operation of the road all the property along the street was damaged on that side of the street——

Mr. BISPHAM: Please confine yourself to this property.

The WITNESS: I think the property in question was injured from 30 to 40 per cent.

By Mr. TODD:

Q. From 30 to 40 per cent. of its previous value?

A. Yes, sir.

Q. Taking $11,000 as the basis of its original value, the depreciation, in your judgment, then, would be from $3,300 to $4,400?

A. 30 per cent. would be $3,300. It would probably be about $3,500.

Q. What effect had this upon renting properties in that vicinity?

A. Rents were similarly affected, in about the same proportion.

Q. How about the class of tenants?

A. Of course the class of tenants varied with the reduced rent. The same character of persons who had occupied property along there before would not remain on account of the nuisance.

Q. From the operation of the road?

A. From the operating of the railway, and for that reason other tenants were willing to occupy them at lower rents.

Q. In your judgment, then, $3,500 was the difference in value on the 6th of December, 1881?

A. I think as near as can be computed.

Q. What do you know of the value of premises 1707 and 1709 Filbert street, now the carriage factory or carriage storehouse? I believe you sold that property.

A. Yes; my father-in-law owned and occupied the house for twenty years and I sold it for him.

Objected to.

Q. It was double the size of this property, wasn't it?

A. Yes, sir.

Objected to.

Cross-examination.

By Mr. BISPHAM:

Q. You say you were acquainted with the property 1711 Filbert street at the time it was purchased by Mr. Marchant?

A. Yes, sir; I said I was acquainted with the property from the time it was built up to the present time.

Q. When was it built?

A. I cannot tell you exactly, but about twenty-five years ago, I should judge, according to my recollection.

Q. This property, as we have already learned by the deed which has been put in evidence, was purchased by Mr. Marchant in 1871. Was not that a time at which prices were ruling high?

A. No, sir, not the highest point by any means.

Q. When was the highest point of time?

A. I should judge somewhere about 1864 or 1865, if my recollection serves me rightly. Probably a little later than that.

31 Q. When did property begin to go down?

A. Property began to go down in 1873.

Q. And it continued to fall until when?

A. About 1878 the tide turned.

Q. Are you fixing the value of this property, which you estimated at $11,000 in 1879, as the figure before or after the tide turned?

A. I think the property was worth that almost any time for several years prior to the operating of the road.

Q. Don't you think it had depreciated somewhat between 1872 and 1879?

A. I think not.

Q. It would depend, would it not, to a very considerable extent as the values of dwelling-houses more or less depend upon the condition of repair in which it was kept?

A. That house was always in fair order.

Q. When did you last see it?

A. During Mr. Marchant's occupation I guess I have been in the house frequently.

Q. What year?

A. I cannot recall the year, but it was probably a year or two prior to their going out.

Q. Can you give us the value, in your judgment, in dollars and cents of that property on the 6th of December, 1881?

A. As I have said, this property has depreciated from 30 to 40 per cent. by the operating of that road. As to an exact day or week after the operating of the road probably I could not say.

Q. What was the fair market value of that property in dollars and cents, in your judgment, in December, 1881, after the road went into operation?

A. I think it was worth about $7,500 then.

32 Q. Would you be surprised to learn that the property sold for $8,000 two or three years afterward?

A. Yes, sir; I was surprised when I heard it.

Q. You did hear that the property had sold for $8,000 in 1884, did you not?

A. Yes, sir; but, if I am not mistaken, it was offered for $7,500.

Q. Do you know anything about that of your own knowledge?

A. From conversation with Mr. William Purves, of the Saving fund.

Mr. TODD: Mr. Bispham ought to know; he was the counsel in the case.

Mr. BISPHAM: I do not know anything about that. I know it was sold for $8,000—$8,050, I think.

Mr. TODD: $8,000 was the consideration in the deed.

Mr. BISPHAM (to the witness): That property had been used as a dwelling-house, hadn't it?

A. Always; yes, sir.

Q. Do you know what it is now used for?

A. Yes, sir. The dwelling was removed and a warehouse was built there by Mr. Maule for the sale of seeds—a wholesale seed warehouse.

Q. Might not a property, in your judgment, be injuriously affected as a dwelling-house and nevertheless have its value enhanced as a place of business?

A. That thing might be, but I cannot see that there has been any rush of business on the street anywhere. I had hoped having properties there for sale that that would occur, but I have not seen any demonstration of that fact yet.

Q. But, in point of fact, this change has taken place in this very property which is now used as a place of business?

A. Yes, sir; those men went there because they could get
33 properties cheap.

Q. And because it was in the neighborhood of the railroad and was available for the shipment of freight?

A. I do not know anything about their object in going.

Q. Can you give me an idea as to what in your judgment would be the value of the ground apart from the house? Take, for instance, the total value in 1879, which you have put at about $11,000. How much of that would you say was due to the ground and how much to the house?

A. I should say the lot alone would have been worth $5,000.

Q. Yet Mr. Maule two or three years afterwards, three years after the elevated railroad was in full operation, paid $8,000 for the property and tore the house down, did he not?

A. Yes, sir; I believe so.

Redirect examination.

By Mr. TODD:

Q. Your value in 1881 was $7,500 and in 1884 this same property was sold for $8,000?

A. Yes, sir.

Q. The only difference three years afterwards between your estimate of value three years before and the actual sale of the property was $500?

A. Yes, sir; that difference might take place any time; that is a matter of accident in a sale of that size.

FREDERICK SYLVESTER, having been duly sworn, was examined as follows:

By Mr. TODD:

Q. What is your business?

34 A. Real-estate broker.

Q. How long have you been in that business?

A. For the last 16 or 17 years.

Q. In that time what opportunities have you had for familiarizing yourself with the values of real estate in the city of Philadelphia?

A. I have had general charged of the sale and renting of properties in this vicinity. I have sold several properties on Filbert street.

Q. And also over the rest of the city generally?

A. Yes, sir.

Q. Do you know the property 1711 Filbert street?

A. Yes, sir.

Q. Please state to the jury what was the value of that property immediately prior to the construction and operation by the Pennsylvania railroad of its elevated road in front of it.

A. I should estimate the value of that property as being about $11,000.

Q. Bring you- mind not to a period immediately subsequent, say the 6th of December, 1881, and state what was its value on that date.

A. I should say, in 1881, it would have been very difficult to have sold that property. In the event of a forced sale it would not have brought one-half its real value.

Q. I will not take a forced sale, but what the property would fairly be worth in the market?

A. It would be very hard to give a quotable value. The property would not sell at that time at anything near its value. In point of fact there had been very few sales between 1880 and 1885.

Q. Very few sales at all?

A. Very few sales.

35 Q. Do you mean in that vicinity?

Mr. BISPHAM: Please confine yourself to this property.

Mr. TODD: I ask the gentleman, who is familiar with property in that neighborhood.

Mr. BISPHAM: He says that he cannot give the fair market value of this property on that date.

By Mr. TODD:

Q. State as nearly as you can its value on the nearest approximate date to December that you can say. What in your judgment was it worth?

A. I should not have supposed that that property would have brought more than $7,000 to $8,000.

Q. There is a difference of $1,000 in your figures. Which do you mean? Do you mean that it might sell at $7,500 or at $8,000, or as low as $7,000?

A. It might sell at $7,500 or $8,000. Unless there was some necessity for the sale I would not have offered it in the market. I do not consider that the market would have been ripe for the sale of that class of property.

Q. What would you estimate the depreciation in value of that property at by reason of the coming of the railroad?

A. I think all property in that vicinity suffered at least 50 per cent. of its selling value—the price at which it could have been sold previous to the advent of the road.

Q. 50 per cent. of that would make a loss of $5,500, and as I get your figures your loss in December is $4,000. How do you account for the difference?

A. I think there has been a general recovery or there was a recovery from the loss or estimated loss occasioned by the coming of the road within two years after the road was actually built.

36 Q. Of how much?

A. Probably one-third was recovered—that is, one-third of the loss was recovered.

Q. That would make, then, two years after the road was in operation that there was a loss of about 33 per cent.?

A. Yes, sir; just about that.

Q. But immediately after the road was put in operation there was then a loss of about 50 per cent.?

A. Yes, sir.

Q. Was that recovery common to the city of Philadelphia in real estate generally?

A. No; I scarcely think it was between 1879 and 1881.

Q. No, no; I refer to 1881 and 1884.

A. Yes, sir; from 1881 to 1885 there was a gradual increase in values.

Q. Generally over the city of Philadelphia?

A. Over the entire city.

Q. This property, along with other property, was affected by that?

A. Benefitted by that.

Q. The-, I understand you that your testimony is that in 1879 and prior to this road being there that property was worth about $11,000?

A. $11,000 would be my estimate of it.

Q. In 1881 there was a depreciation of about 50 per cent. and in 1885 there had been a recovery of about one-third of that loss, making a loss *of* 1884 or 1885 of about thirty-three per cent.?

A. Yes, sir; about 33 per cent.—one-third of the value.

Cross-examination.

By Mr. BISPHAM:

37 Q. Did you make any particular examination of this property No. 1711 Filbert street at any time?

A. Yes, sir.

Q. When?

A. I went there about ten days ago and was up there again yesterday.

Q. Mr. Marchant's property had been torn down and the place occupied by a seed store?

A. Yes, sir.

Q. You said in 1881 that you did not think the market was ripe for sale. What did you mean by that?

A. I think that any person who had been compelled to sell prop-

erty on Filbert street would have found it very difficult to have gotten a market for his property.

Q. You use the expression that the market was not ripe.

A. Not fit would have been the proper word.

Q. I suppose afterwards this became more ripe, didn't it?

A. No; I think it to a certain extent had been overcome by the gradual rise in value incident to the gradual rise of real estate throughout the city.

Q. Don't you think you ought to have taken into consideration the availability of the properties for business purposes?

A. No.

Q. You do not think that would have made any difference at all?

A. No; because in point of fact very little property has been changed for business purposes from the 15th to 20th.

Q. But in point of fact this very property was so changed, was it not?

A. It has been changed; yes, sir.

38 LISLE STOKES, having been duly sworn, was examined as follows:

By Mr. TODD:

Q. What is your business?

A. Real-estate broker and conveyancer.

Q. How long have you been so engaged?

A. About 22 years in the city of Philadelphia.

Q. Do you know anything about the property 1711 Filbert street?

A. Yes, sir. I have been familiar with that property and with properties along the line of Filbert street from 20th street down to 7th street for the last ten or fifteen years—ridden by them every day.

Q. Have you had transactions in connection with property in the vicinity?

A. Yes, sir. The sale of real estate and conveyancing of property along the line of Filbert street, within fifty feet of this property.

Q. Be kind enough to state to the court and jury what, in your judgment, was the value of the premises 1711 Filbert street immediately prior to the construction of the elevated railroad in front of it by the defendant in this case.

A. My estimate of the value of that property about 1879 would be between $11,000 and $11,500. I base that upon the absolute sales of other property in the same row of like character and almost identical.

Q. Be kind enough to state to the court and jury what was the value of that property in December, 1881.

A. I think there was a depreciation in the actual value of that property of from 40 to 50 per cent.

Q. At that time?

A. Yes, sir. As soon as that elevated road was completed,
39 from my knowledge of property there and from conversation with real-estate men and parties riding down in the cars, the general impression seemed to be that there was no inducement that a man could hold out——

Objected to.

Q. State your own judgment.

A. My opinion was that you could not hold out any inducement in the way of price for a man to buy property on the line of Filbert street as a dwelling.

Q. And the depreciation, in your judgment, then, you say was from 40 to 50 per cent. of the value of $11,000 to $11,500?

A. Yes, sir.

Q. Please turn that into figures and fix an actual value for the property in December, 1881. State what you think that property was fairly worth on that date.

A. I suppose that the actual depreciation there in 1881 was about $5,000; possibly $5,500.

Q. That would make that property worth about $6,000 to $6,500 at that time?

A. Yes, sir.

Q. Do you know of the subsequent sale of that property?

A. It was bought by Mrs. Maule for $8,000, I believe. So the record shows.

Q. The difference in 1881 of $6,000 and in 1884 of $8,000—how do you account for that?

A. By the general appreciation of property in the business portion of the city.

Q. Not all of this special locality?

A. Not at all; no, sir. There is nothing that the railroad company has done there to improve property in the last five years, in my estimation.

40 Cross-examination.

By Mr. BISPHAM:

Q. Have you take- into consideration in estimating the depreciation in the value of this property its availability for business purposes?

A. Yes, sir.

Q. In point of fact, did not the property become more available for certain business purposes after the construction of the elevated railroad?

A. Really, I fail to see in what way.

Q. I mean, for instance, for shipment. For instance, might not the property be more available for such purposes as a locomotive works or an iron foundry or any place where heavy machinery is manufactured?

A. In the first place, it is not large enough. That would not be practicable; but with the properties in that immediate neighbor-

hood, with the immense number of places under the elevated road for rent, I really cannot see that the railroad improvement has added anything to the value of that property or its facilities for manufacturing purposes.

Q. You do not mean to tell the jury that in point of fact the proximity of a railroad, whether it is elevated or at grade, takes away from the value of a building which is used for manufacturing purposes, such as I have mentioned, do you?

A. No, sir; I do not mean to say that.

Q. So that property in that neighborhood might have its value enhanced, might it not, if it were used for the purposes I have spoken of?

A. I think it would be very hard to determine just what the percentage of advance would be.

41 Q. That might be, but you would not say positively that there was no advance by reason of that cause, would you?

A. I do not think there has been any advance in this particular case.

Q. I do not speak of this particular case now. I ask you about your opinion generally as to whether in your judgment as a real-estate man the proximity of a railroad would not rather tend to enhance than to take away from the value of ground which was to be used for the purpose of being improved for manufacturing purposes.

Mr. TODD: Do you mean without any connections with the railroad—without track facilities?

Mr. BISPHAM: Yes; of course there would be track facilities.

Mr. TODD: Do you mean to say that you would give track facilities to this property?

Mr. BISPHAM: No; I refer to facilities for freight. (To the witness:) Assume that the property is to be improved for the purpose of erecting a manufactory for the manufacture of heavy articles, the transportation of which if it was far away from a railroad would add to the cost of production. Do you mean to say that the near proximity of a railroad would depreciate the value of property used for such purposes?

A. It might; yes, sir.

Q. How?

A. In this particular case the same objection might exist to the manufacturing interests that exist to it as a dwelling-house.

Q. Take the case of a locomotive works, do you mean to say that the proximity of a railroad would interfere with the value of a locomotive works?

A. No, sir; but this property is not adapted for a locomotive works. It is not large enough.

42 Q. In point of fact, don't you know that in that neighborhood business establishments have gone there since the construction of the elevated railroad?

A. Two to my knowledge—the property in question and the Gregg & Bowe property, immediately next door.

Q. The Gregg and Bowe property, you say, is immediately next door?

A. Yes, sir.

Q. And this property has been turned into a business property?

A. A seed warehouse, I believe.

Q. You do not mean to tell this jury, do you, that the operation of trains of cars on a road or the use of a railroad would interfere with the value of a car works?

A. No; I do not mean to say that.

Redirect examination.

By Mr. TODD:

Q. The Gregg & Bowe works were built on what lots, if you know?

A. Immediately next door—40 feet front.

Q. The McFarland property?

A. Yes, sir.

Q. What was the value of that property in 1879?

A. Mr. James B. McFarland, the owner, told me that his price——

Objected to.

Q. State what, in your judgment, was the value of it in 1879.

A. From $22,000 to $25,000.

Q. What did they sell it for?

Objected to. Objection sustained.

WILLIAMS L. BLANCHARD, having been duly sworn, was examined as follows:

By Mr. TODD:

43 Q. Where do you reside?

A. 1833 Filbert street.

Q. That is a square above the property of Mr. Marchant's in question?

A. Yes, sir.

Q. How long have you resided there?

A. Over 13 years.

Q. Covering the period when this road was constructed and operated?

A. Yes, sir.

Q. Be kind enough to state to the court and jury what effect the operation and construction of this road has had upon the property in that vicinity.

A. It has depreciated them very largely indeed; it has almost deprived them, in fact, of being residences.

Q. For what reason?

A. Because of the noise, confusion, dirt, and things of that kind damaging property; if an earthquake would come we would never know it unless the house would go down.

Q. How are your bed-rooms situated as to the railroad tracks on the opposite side of the street?

A. I cannot tell you as to the distance.

Q. Do passengers sitting in the trains look into your bed-rooms?

A. On the second floor they look right in.

Q. How is it as to resting there at night?

A. It disturbs my rest very much indeed, and so it does my family; since that road was built I have become quite a sleepless man from the effects of the railroad.

Q. You are the owner of that property?

A. My wife's estate is the owner of it.

Q. You have continued to reside there, however?

A. Yes, sir.

By Mr. BISPHAM:

Q. You are the plaintiff in a case against the Pennsylvania Railroad Company, are you not?

A. I will be.

CARVER W. REED, having been duly sworn, was examined as follows:

By Mr. TODD:

Q. Where do you reside?

A. 1821 Filbert street.

Q. Directly opposite the Pennsylvania railroad?

A. Yes, sir.

Q. How long have you resided there?

A. About 10 or 11 years.

Q. Covering the period of the construction and operation of this railroad?

A. Yes, sir.

Q. What effect has it had upon property in that vicinity?

A. Well, I don't know. I should suppose it had considerable effect.

Q. State about the operation of the road, the passage of trains, cinders, dirt, etc.

A. I am not there enough to know much about the passage of trains. In the daytime I am at my business, and at night I generally go home to sleep.

Q. What do you know about it?

A. I know that it is objectionable. That is about all I can say about it. I can tell you a little damage that it has done to my property if you want to know anything about that.

Objected to.

The COURT: The only question is the value of this particular property.

Mr. TODD: Undoubtedly that is the case, but the general effect of the operating of the road can be shown.

The COURT: It does not follow that the same effect will follow.

Mr. TODD: It does most undoubtedly and was so held in the Duncan case.

The COURT: I do not care what was held. The only question is the effect of the road upon this particular property and its immediate vicinity.

Plaintiff rests.

Defendant's Testimony.

Mr. BISPHAM: For the purpose of raising the legal question which arises in all these cases and which I do not *desire* to discuss in any way, but simply to have the record put in shape that we may not be precluded from discussing it in another court, I offer in evidence the following documents and acts of assembly:

Charter and supplement of the Pennsylvania Railroad Company, charter approved April 13th, 1846, Pamphlet Laws of 1846, page 312.

Act of assembly of May 16th, 1857, Pamphlet Laws of 1857, page 519.

Deed-poll, Commonwealth of Pennsylvania to the Pennsylvania Railroad Company for the main line, dated 31st July, 1857.

Notice of public sale of the main line of the public works, dated May 16*ty*, 1857, by the then governor of Pennsylvania.

Certificate from minutes of the Pennsylvania Railroad
46 Company of July 20th, 1857.

Act of assembly approved March 27th, 1848, Pamphlet Laws 1848, page 273.

Mr. Todd offers in evidence act of assembly — April 4th, 1868, Purdon's Digest, 1094, limitation of liability act.

Defendant's counsel object to the offer of the act, but admit its acceptance by resolution of the board of directors.

Objection overruled. Exception by defendant.

Counsel for — also offer in evidence ordinance date- 13th October, 1879, entitled An ordinance to authorize the Pennsylvania railroad to occupy a portion of Filbert street for railroad purposes.

Objected to. Objection —. Exception by defendant.

Counsel for — also offers in evidence act of assembly dated June 9th, 1874 (see page 53 of Duncan paper book), authorizing the railroad companies to re-locate, change, or elevate their railroads, etc., etc.

Objected to. Objection sustained. Exception by defendant.

Counsel for defendant also offers to prove (see page 11, Duncan paper book) as follows: That Hon. John Scott appeared on behalf of the Pennsylvania Railroad Company before the law committee of councils of the city convened to consider the ordinance which has been offered in evidence by the plaintiff. The railroad committee had previously considered the subject and favorably acted upon it, but in consequence of a question of law arising it was referred to the law committee for further consideration. Mr. Scott, Mr. Roberts, Mr. Kneass, and other- representing the Pennsylvania Railroad Company were present, and to prove that Mr. Scott, as counsel for the

company and on its behalf, claimed that the Pennsylvania rail-
47 road then possessed, by authoritative grants from the legislature of this State, undoubted right to build this branch without any authority whatever from the councils of Philadelphia; that as proof of the character of those possessions he read to the committee the seventeenth section of the charter of the company and the eleventh section of the act authorizing the sale of the main line, with evidence that the company had purchased the main line under that act, and claimed that under this legislation there were two distinct powers, under *either* of which the defendant had the right to build the Filbert-street extension now in question and referred to in said ordinance. Having thus shown clear legislative authority to construct the road, he stated the remaining question was, "Has the company the right in constructing it to occupy the streets of the city to establish this road?" citing the decisions of the supreme court of the State, 12 Wright, page 355. He cited various other opinions, showing that the company had the undoubted right to build the proposed road, and that the company had come before the councils only out of courtesy and in order to meet any allegation that might be made that it had arbitra-ily and without proper respect for the municipal authorities settled the location of this road. I offer this for the purpose of rebutting any presumption which may possibly arise that the Pennsylvania Railway Company in any manner became a party to the ordinance of the city authorities referring to the construction of the structure complained of in this suit.

Objected to. Objection sustained. Exception by defendant.

JOSEPH B. BARRY, having been duly sworn, was examined as follows:

48 By Mr. BISPHAM:

Q. You are in the real-estate business, and have been for how many years?

A. For over forty years.

Q. I suppose you have had a very large experience in the purchase and sale and management of properties during that time?

A. I have purchased and sold properties and invested large *large* amounts of money on mortgage throughout most all portions of the city of Philadelphia.

Q. Does that include the portions through which Filbert street runs?

A. Yes, sir; I am perfectly familiar with Filbert street.

Q. And with the values of properties between 17th and 18th?

A. Yes, sir.

Q. I think you were also an assessor, were you not?

A. I am now one of the real-estate assessors of the city of Philadelphia.

Q. How long have you occupied that position?

A. Seven years.

Q. What, in your judgment, was the property 1711 Filbert street worth in 1879, prior to the construction of the elevated railroad?

A. My judgment of the value of that property in 1879, at the time of the construction of the railroad, would be about $10,000. It was a four-story brick house, as I have a recollection of it, with back buildings to it. The house has been torn down.

Q. What would you put the value of the property at after the construction of the elevated railroad, say along during the years 1882, 1883, 1884, and 1885?

A. I would consider that there was a depreciation of the value of the property by reason of that railroad coming there, and I made the depreciation about $2,000.

Q. How would the value of that property in 1879 compare with its value in 1871? Was there an appreciation or depreciation of values from 1871 to 1879?

A. In 1871 property was higher.

Q. This property was purchased in 1871 and the consideration was $5,500, subject to a mortgage of $5,500. You say the values of property were higher in 1871 than in 1879?

A. Property was higher at that time.

Q. Was the depreciation general from 1871 to 1879?

A. The depreciation after that was general, and afterwards it came up again.

Q. It has been testified that this property sold in 1884 for $8,000. How did values in 1884 compare with values in 1881 and 1882?

A. In 1879 or 1881 they began to rise about that time.

Q. They began to rise about 1879 or 1881?

A. Yes, sir; there was an appreciation after that.

Q. Did that rise continue?

A. I think that rise was a general rise throughout the city of Philadelphia.

Q. How would the value of this property in 1882, for instance, compare with the value in 1884; would it be about the same?

A. I think it would be about the same. I do not see any difference. I would not put a higher valuation on this property at any time in the last ten years more than I say—$10,000.

Q. And the value in 1884 being fixed at $8,000 the value in 1882 would be about the same?

A. Yes, sir.

Q. On the 6th of December, 1881, what would you say would be about the fair value, being after the elevated railroad came? You have said that it was worth about $10,000 in 1879.

A. Are you now speaking of this very property?

Q. Yes; and you put it at about $8,000 in 1882.

A. After the elevated railroad came there was a general feeling that the elevated railroad would be a great damage to all property along Filbert street, and this property in all probability felt the effect of that feeling in the community. If persons owning property on Filbert street had had the nerve to hold onto their property until the present time they might have still gotten the proper price for it to a very great extent; but some were forced to sell, as I understand it in this case.

Q. And sometimes persons were alarmed, I suppose?

A. They were alarmed, and they sold out at a depreciated price. My measure of damage in this case is just the difference between what the property sold for and what I value it at.

Cross-examination.

By Mr. TODD:

Q. Let me, however, direct your mind to December, 1881. The property when it was resold was, as I understand you, in 1884 or 1885, when there had been and overcoming in the community of this feeling of want of confidence in Filbert street and property generally had appreciated; but now bring your mind back to December, 1881.

A. Do you mean the time of the sheriff's sale?

Q. No; I mean the time when the road was finished, when you have said that there was a general feeling with reference to Filbert-street property of depreciation. Bring your mind back to that time and state what was the depreciation in value at that time or what was the property worth in December, 1881, in the market, as the market was, no matter whether rightfully or wrongfully or what it was due to or anything else, but as the market was in 1881.

51 A. It was an extremely difficult question to answer when you come to consequential damages. The only guide that I have particularly in this case is what I have to see before me and what I glean from the record. This property sold for $8,000, and I valued it at $10,000; therefore I say the damage is $2,000.

Q. But you have stated that that was after there had been a recovery in the community on account of this very particular depreciation along Filbert street. Now, our right of action runs back to December of 1881, and what I want you is, not to take October of 1885, when this property was resold, but to tell us as of December, 1881, because we had lost all title and interest in it in October, 1885.

A. Well, sir, at that time it is very likely that if this property had been forced into the market and sold it would probably have sold for $1,000 less than I have put on it, but I cannot say any more.

Q. You think, then, that the depreciation in 1881 would have been about $3,000?

A. It might have been about $3,000. In all probability, if these people had held on, they might have got their price for the property after all. I am trying to get at the t-ing exactly as it is.

Q. Then, as I understand you, your value of the property in 1879 was $10,000, and in 1881, immediately after this road was in operation, in December, 1881, it would have sold for about $7,000?

A. I think it is quite likely; I am certain that it would have sold for $7,000.

Q. That would have made the depreciation at that time about $3,000?

A. It might have been $3,000 at that time with the feeling in the community.

52 Redirect examination.

By Mr. BISPHAM:

Q. I understand you that that would be the case if a person was forced to sell his property immediately?

A. Yes, sir; if it was forced into the market.

Q. And I understand you that your judgment coincides with what you found upon the record, that the depreciation was actually only $2,000?

A. That is my judgment. I make my judgment upon the record, and the record says $8,000 the property was sold for, and I valued it at $10,000, and therefore my judgment would be the difference between what it sold for and what I valued it at as the measure of damages.

Q. I understand that your judgment coincides with what you find upon the record?

A. Yes, sir; exactly. That is my judgment.

Q. That that was the actual depreciation of the property?

A. Yes, sir.

Q. But I also understood you to say that there was a temporary feeling?

A. There was a temporary feeling at that time, which might have made the depreciation at that time a little more.

Q. Was there or not in point of fact any difference in value in 1884 and 1882?

A. Not a bit; not at all. It was the same thing.

Q. It was precisely the same market value in 1882 and 1884?

A. Yes, sir.

The COURT: It strikes me that the basis of damage in this case would be what the property was worth just before the railroad came there and what it sold for.

53 Mr. TODD: If that would be the measure of damage, this property was sold to these defendants at $4,000. (?)

The COURT: I was under the impression that your client owned it at the time it sold for $8,000.

Mr. TODD: No, sir. A judicial sale had deprived us of our ownership.

The COURT: Then I ought not to have interfered.

Mr. TODD: The rule, as I understand *ot* to be, is, What was the value of the property the day that the injury was done and completed as compared with the value as unaffected by the injury?

The COURT: That would not be a fair value. You do not take into consideration the appreciation which may arise from this very railroad.

Mr. TODD: I believe the rule in Pennsylvania is that a benefit which is common to the entire community is not to be assessed against the particular disadvantage to a property.

The COURT: That is the general rule, but there must be exceptions to all rules.

Mr. TODD: Our right of action is on the 6th of December.

The COURT: Your right of action commences then; but suppose you had retained the property a year and the property had appreciated by reason of this railroad?

Mr. BISPHAM: The right of actions stated by the plaintiff in his declaration is not only for the building of the railroad, but for the operation of the railroad; therefore the jury will have to consider, under the allegations stated, the effect of the operation of the railroad. You cannot fix the day after the railroad was constructed and the first day when it went into operation as the time when you are to fix the value of the property. You must fix the effect
54 of the operation of the road upon the value of this property, and can only ascertain that by the taking some time subsequent to the building of the road.

The COURT: This is unlike the rule that applies to the taking of property for a public street, because the ownership ceases, the injury is done, and the right of damage is complete; but in a case of this kind damage to the property arises not so much from the fact that the railroad has been built, but because it has been used, and therefore in a case of that kind you are to take the advantages of the running of the road, whatever they may be.

Mr. TODD: I do not think that we differ so much. I would only like to call your honor's attention to this: that is, that you have to measure this as of a specific date—as a road that would be operated fairly from the way roads have been operated in the past—how it would be operated in the future.

Mr. BISPHAM: Not exactly. You cannot ascertain damage unless you have ascertained the operation of the road.

Mr. TODD: Then we would have a right to bring an action every six months or within any limited time that might be named for the continued depreciation and annoyance to this property. Clearly that is not the law.

The COURT: I am sorry to have started this discussion, because, as I understand this witness, he fixes the depreciation just about what the other witnesses said.

Mr. BISPHAM: No; he fixed the depreciation at $2,000. On my re-examination he testified distinctly that $2,000 was the difference between the fair market value of the property before the road was constructed and the fair market value after the road was constructed. (To the witness:) Is that so?

A. That is my judgment.

By Mr. TODD:

Q. And you fixed the value at $10,000?

55 A. Yes, sir.

Q. And your estimate of what it was worth subsequently is fixed by the record sale of $8,000 in 1885?

A. Yes, sir.

Q. But that owing to the condition of the market in 1881 and 1882 it was worth $1,000 less at that time?

A. Excuse me; I don't think I said that.

Q. Did you not?

A. No; I said this: That from the feeling in the community of the effect upon this property it might have been forced into the market and sold at that price.

The COURT (to Mr. TODD): When did your client cease to be the owner of the property?

Mr. TODD: In October, 1882.

The COURT: That is the period which this discussion ought to take, from the time of the erection of the road and down until you ceased to be the owner.

Mr. TODD: If that is to be the criterion I shall put simply in evidence the record of the judicial sale.

The COURT: You can establish that fact otherwise.

Mr. TODD: I suppose there is no better evidence than the sheriff's deed when we ceased to be the owner.

The COURT: Yes; there is better evidence than that—to call the sheriff or the party that bought.

Mr. TODD: Mr. Bispham was the counsel*m*, and it was sold to him. He knows.

Mr. BISPHAM: There is no doubt about it that the title of the property went out of this plaintiff in October, 1882.

The COURT: Then confine your examination to that period.

56 It is admitted that the title went out of Marchant on October 7th, 1882.

Mr. TODD (to the witness): Bring your mind to bear upon that date and dismiss from it for the moment the fact that this property was resold to Mr. Maule for $8,000. What would you say down to October 7th, 1882, was the fair market value of that property then? What could you have got for it in the market?

A. I thought that property ought to have sold for $8,000.

Q. That is not my question. I ask you what could you have got for it in the market.

A. I couldn't tell you that. If you take a property and put it at public sale and force it into the market you don't know what it is going to sell for.

The COURT: That is not a fair test. As a real-estate expert you can fix the value of the property from your own knowledge of it and your own conclusion.

The WITNESS: From my own knowledge of the value of that property, I certainly would think that property, notwithstanding the railroad there, was worth 8,000 in October, 1882.

By Mr. TODD:

Q. What did you mean by saying that immediately after the construction of this road it would have sold for $1,000 less?

A. I beg your pardon. I do not think I said that.

Mr. BISPHAM: He said at a forced sale.

The witness's prior testimony upon this point read.

By the COURT:

Q. What do you mean by saying if it had been forced into the market?

A. I mean if the owners of this property at that time on account of the feeling which was existing of damages by reason of
57 the elevated railroad being there—that if these people had forced that property into the market at that time that it would have sold——

Q. I want to know what you mean by "being forced into the market."

A. Public sale.

By Mr. TODD:

Q. Is a public sale any test of the value of a property?

A. Well, yes; it is.

Q. Was not this property forcibly taken from this plaintiff here?

A. Yes, sir; but by sheriff's sale.

Q. No, no; by this railroad company. Didn't they forcibly take away from him this property? We were not a party to it, and we did not ask them to come.

The WITNESS: I do not think I can answer that question.

The COURT: The sale of any property at public sale is some means by which you ascertain the value of property.

The WITNESS: It is as I understand the law. That property should be taken.

The COURT: No; I say it is one of the elements of the proof of the value of a property that you take into consideration as an expert always in valuing property?

A. Yes, sir; it has a very great influence with us.

Q. How does that affect what you call the commercial value of a property that was not sold in that way?

A. The commercial value of a property is a very different thing.

Q. That is what we want to know here.

A. When you come to the commerical value and what we understand by that do you mean where a merchant or any one desires to have a place?

Q. I mean buying and selling land or property; not that any particular person should have it, or for a particular purpose,
58 but, in other words, market value.

A. Well, sir, I still come back to where I started from. I say that the commercial value of that property was——

Q. No, no; my question was what comparison is there between what we would call a public sale of property and a private sale?

A. Somtimes there is a great deal of difference. It varies very considerably. Sometimes property sold at private sale will sell for thousands of dollars over what it will sell for at public sale; that has been my experience.

Q. Then I understand from your answer that a public sale is to be considered as the lowest value of any property?

A. It would be. A public sale is the lowest estimate that you can make of the value of real estate.

By Mr. TODD:

Q. In all cases?

A. In all cases.

Q. And a private sale means a willing buyer who will give more to an unwilling seller?

A. Yes, sir.

Q. Which represents market value, the unwilling seller and the willing buyer, or what it brings generally when everybody is open to free competition?

A. Market value is what it will sell for generally at public sale.

Q. What would this property have sold for at public sale any time in 1882?

A. I think it would have sold for $8,000.

Q. Then what did you mean by telling me that it would have sold for $1,000 less at public sale?

Mr. BISPHAM: He did not say at public sale; he said at forced public sale.

59 By Mr. TODD:

Q. You did not mean a sheriff's sale?

A. Not at all.

Q. You meant to put it at Thomas & Sons or one of the other auctioneers?

A. I said compelled—by forced sale. It might have gone down and sold for $7,000 at forced sale. It might have sold for $6,000 at forced sale.

Mr. BISPHAM: If you had not the option to withdraw your property.

The WITNESS: If it was a peremptory sale.

By Mr. TODD:

Q. But did you not say to this jury that it would have sold for $1,000 less at a forced public sale?

A. I said if the property had been forced into a public sale it might have sold for $3,000 less than $10,000.

Q. That is, $7,000.

A. I said so; yes, sir.

Q. But nevertheless you think that it ought to have sold at $8,000?

A. I think if those people had been able to take hold of their property——

Q. O, no; I speak of 1882.

A. In 1882 I think it certainly would have sold for $8,000.

Q. Then you have told us that there had been a recovery in prices between 1881 and 1884, and yet it sold for $8,000 in 1884.

A. Not exactly. I did not say a recovery in prices. The public feeling had been gotten over, because of the feeling which had been gotten over in relation to the dreadful scare in regard to the Pennsylvania railroad.

Q. There was a stronger market—is that what you mean?

A. Yes, sir.

60 Q. Then, with a stronger market, it would have sold two years before that for the same amount; is that it?

A. I don't understand you.

Q. Then that is all I have to ask you.

A. I think my evidence is sufficient on that point.

By Mr. BISPHAM:

Q. I understand you that at a fair public sale in October, 1882, the property would have brought, in your judgment, $8,000?

A. That is my judgment.

CRAIG D. RITCHIE, having been duly affirmed, was examined as follows:

By Mr. BISPHAM:

Q. You are the president of the Real Estate Title Insurance and Trust Company?

A. I am.

Q. You have been connected with that company for how many years?

A. Ten years.

Q. Since the date of its organization?

A. Yes, sir.

Q. In that position I presume you have had large experience in the purchase, sale, and rental of real estate and the investment of money on real estate?

A. We have had a very large experience as to the sale of real estate and the lending of money on real estate; nothing as to rentals of any account.

Q. Before you became connected with your company you were a conveyancer in business for how many years?

A. I had been a conveyancer for more than twenty years.

Q. You are of course familiar with the value of property
61 in the neighborhood of Filbert street between 17th and 18th, from Broad street out to the river?

A. Yes, sir.

Q. What, in your judgment, was the value of the property 1711 Filbert street in 1879, before the elevated railroad came there?

A. I think the value of that property was $10,000.

Q. Would that be a fair market value for the property?

A. I should think it would be a full market value for the property in 1879.

Q. Had property depreciated between 1871 and 1879?

A. Yes, sir; property in Philadelphia was lower in 1879 than it has been since or had been for many years previously.

Q. What was the fair market value of the premises 1711 Filbert street in October, 1882, after the elevated railroad came there?

A. I think the property would have brought at a fair sale $8,000 at least.

Q. At what would you put the depreciation, if any, caused by the elevated railroad upon that property?

A. $2,000.

Q. Was there any difference between the values of properties generally in 1879 and 1882?

A. Taking the city generally, there was a rise from the close of 1879, which rise has continued to the present day.

Q. What effect has the elevated railroad upon property as business localities?

A. Property on Filbert street east of 16th street has been very much appreciated in value since the elevated road has been there and I think its influence is extending towards 17th street. I do not thank there has been any appreciation of any very great amount west of 17th street; but on this particular property there has
62 been a very fine storehouse erected—one of the handsomest front *sot*rehouses in Philadelphia—a seed store.

Q. Have there been any business improvements in that immediate locality?

A. Yes, sir; the property that belonged to Mr. Hunter has been turned into a milk depot. Business seems to be working along Filbert street.

Q. There is also a carriage factory, is there not?

A. There is a carriage factory at 20th and Filbert which has been there a number of years, and another carriage factory on Filbert between 16th and 17th, lately built.

Q. Do you mean the Gregg & Howe carriage factory?

A. Yes, sir.

Q. Those are all the business improvements that you recall, but you say the business improvements are tending out westward.

A. East of 16th street there have been a great many houses converted into stores of various kinds.

Cross-examination.

By Mr. TODD:

Q. Was the injury to this property which you have fixed at $2,000 as great on the 6th of December, 1881, immediately after the road was completed, as it was on the 7th of October, 1882?

(Objected to; the court has already ruled upon the time from which damage is to be estimated.)

The COURT: The question is, What was the value in 1882?

The WITNESS: I stated that I believed at a fair sale it would have brought $8,000 in 1882.

By Mr. TODD:

Q. I ask you now what it would have brought at a fair sale on the 6th of December, 1881.

63 (Objected to. Objection sustained. Exception by plaintiff.)

Q. You have said that there have been appreciations between 1881 and even down to the present time. Has that been common to property generally in the city of Philadelphia?

A. I said that taking property in Philadelphia generally from the close of 1879 to the present time there has been an appreciation in value.

Q. It has been getting better?

A. Getting better—worth more.

Q. That is not due to the Pennsylvania railroad, is it, or its construction there?

A. I answered the question generally as to all property in Philadelphia.

Q. I suppose the Baltimore and Ohio may have had something to do with it?

A. The Baltimore and Ohio may have had something, and I have no doubt the Pennsylvania Elevated has had something to do with it.

Q. But that is a common benefit to the whole community?

A. Yes, sir.

Q. And not a particular benefit to that property from the Pennsylvania railroad?

A. East of 16th street the Pennsylvania railroad has very much benefitted property on Filbert street.

Q. Since when?

A. Since the elevated road was put there.

Q. And it is worth more now than before the elevated railroad came there?

A. Very much more east of 16th street.

Q. What have you to say west of 16th?

A. I think it is gradually getting better.

64 Q. Owing to the kind of improvements that you see going there?

A. Yes, sir.

Q. Do you happen to know what those properties cost west of 17th street—the properties which you have mentioned here as being evidences of growth?

A. Do you mean what they cost the parties that bought?

Q. Yes.

A. I know what Mr. Maule paid for the land.

Q. That was $8,000?

A. Yes, sir.

Q. That was not an improvement, was it?

A. I have stated $2,000 depreciation on that.

Q. Now, take the property adjoining.

The COURT: I think your examination should be restricted to the advantage or the disadvantages which the witness may have seen in this road and its operation. Of course, if this property had depreciated from general reasons that would not affect the property, considering the railroad as being there. As I understand the witness, from 1879 to 1882 there was a general appreciation of property

all over the city, simply because there were more people to buy it and more money to buy it with. Of course, that affected this property, and would have affected it whether the road was there or not. What I want to know is was this property in 1882 benefitted in any way by reason of the road being there. Was its market value affected in any way by that reason?

The WITNESS: I do not think that in 1882 the benefits flowing from the elevated road to properties on Filbert street had begun to be felt.

Q. Had they begun to be calculated? Because, after all, that is the question. Were the supposed advantages an element in
65 the calculation of the value of property, although they had not begun to be seen or felt?

A. Well, I think they had on properties east of 16th street.

Q. No; I mean this particular neighborhood.

A. No; I don't think so.

Q. I mean this particular house.

A. That I could not say. I do not know. I do not think property west of 17th had appreciated any in 1882.

By Mr. TODD:

Q. You have been president of the Real Estate Title Company, have you not, for the last ten years and more?

A. Yes, sir.

Q. Prior to that time you have been a conveyancer rather than a real-estate broker?

A. Yes, sir.

Q. And to-day you have not charge, have you, of the valuations of the properties that pass through your concern?

A. Yes, sir.

Q. You will insure a property for as much as any man is willing to pay premium on the price, won't you?

A. Not always, but generally so.

Q. The more premium he will pay the more you are willing to insure, are you not?

A. As a rule; yes, sir.

Q. Then price of itself don't enter into the question?

A. Price does not enter into consideration with regard to our taking a risk upon the title, but when we have examined as we have in the last ten years over 13,000 different sales or loans, and they have all passed more or less under my eye, I have learned what people are willing to sell for and what others are willing to buy for, and what people are willing to borrow and what others are
66 willing to lend.

Q. How about Filbert street—how many transactions have you had there?

A. That I couldn't tell you; neither could I tell you in any locality in Philadelphia without looking at our books.

Q. So far as Filbert street is concerned, can you recall a single

transaction from your own observation of it between 1876 and 1882 west of 16th street?

A. I have no doubt whatever we have had some; that I cannot answer because I do not charge my mind with them. If you were to ask me to-day what matters came in last week I could not tell you.

Q. Of course not. I would not anticipate that from a man with so many affairs on his hands. Can you, however, recall to your mind, as a guide for the judgment which you have given this jury, a single transaction in Filbert-street property?

A. I do not recall at this time a specific transaction.

By Mr. BISPHAM:

Q. You speak from your general recollection of the transactions?

A. Yes, sir.

Mr. TODD: He has no recollection of them at all.

The WITNESS: I have passed many titles on Filbert street when I was in my private business, but I could not tell you to day which the properties were.

HENRY M. BOYD, having been duly sworn, was examined as follows:

By Mr. BISPHAM:

Q. You are a conveyancer and in the real-estate business?

A. Yes, sir.

Q. How long have you been engaged in that business?

A. About thirty years.

Q. Where is your place of business?

67 A. 30 North 7th street.

Q. Are you familiar with the values of properties in different sections of the city and have you been during that period?

A. I have bought and sold a great deal.

Q. Are you acquainted with the values of property on Filbert street from Broad street out to the river?

A. Yes, sir; I have operated on Filbert-street property.

Q. From your knowledge and general experience in operations, what would you say was the value of the property 1711 Filbert street in 1879, before the elevated railroad was built?

A. I should think it was worth about $10,000.

Q. How did prices in 1879 compare with the prices in 1871—had there been a depreciation or an appreciation?

A. In 1879 real estate was very low in this community. It commenced to improve gradually, but I do not know that it was felt a great deal in the time that you have mentioned.

Q. It was lower in 1879 than it was in 1871, wasn't it?

A. Oh, yes; it was much lower in 1879. I think real estate had reached its lowest price in 1879. It commenced to go down immediately after 1873, and went down very rapidly.

Q. It reached its lowest point about 1879?

A. That is my opinion.

Q. About how long afterwards did it begin to appreciate?

A. I think in 1880 and 1881 it commenced to take a turn for the better all over the country. People commenced to build; houses commenced to move a little. Capitalists began to seek investments in real estate, which they had not done previously.

Q. In October, 1882, what was the fair market value of this property, 1711 Filbert street?

68 A. I think it would have brought $8,000, anyhow; not less than that, and perhaps a little more.

Q. That, in your judgment, would have been a fair market value?

A. Yes, sir; I should think so.

Q. At what would you put the depreciation, if any, in the value of the property caused by the elevated railroad?

A. In the neighborhood of about $2,000. It depreciated in value for a dwelling-house. I do not think it was for any other purpose.

Q. What other purpose do you mean—business purposes?

A. Business purposes; any manufacturing purpose. The purpose for which it is occupied now, I think, is a very proper one and a very good position for it.

Q. So that, in your judgment, the elevated railroad would not have had the effect, at all events, to that extent of depreciating the value for purposes other than a dwelling?

A. No, sir; only as a dwelling, I think.

Q. Have you made any estimate as to what the different proportions of the ground and the dwelling are that enter into the calculation of $10,000, or have you not taken that into consideration?

A. That ground is twenty feet front, if I remember right.

Q. It is twenty by one hundred and seventeen. Would the ground alone in 1879 have been worth $8,000?

A. No, sir; it would not.

Q. It was purchased in 1884 and torn down and improved, the purchase being for $8,000?

A. Yes, sir; so I understand.

Q. So that practically was paying $8,000 for the ground?

A. Yes, sir; I think the value of the ground has appreciated. I think it has improved. For dwelling-houses it has depreciated.

Cross-examination.

69 By Mr. TODD:

Q. What is your business?

A. Attorney-at-law and conveyancer.

Q. How long have you been such?

A. About thirty years as a conveyancer. I have been an attorney-at-law since 1880, I think.

Q. Are you often called as witness in these cases?

A. I have testified in a number of cases.

Q. For the Pennsylvania railroad?

A. A number of times for them; yes, sir.

Q. For anybody else?

A. I have appeared for the city and I have appeared for private individuals.

Q. Many times?

A. I cannot call to mind how many times.

Q. Generally you have been called for the Pennsylvania railroad?

A. I couldn't say how many times. I have been called a number of times.

Q. Generally speaking you have been called more frequently by the Pennsylvania railroad?

The COURT: That is not a proper question. It is a reflection upon the witness and is unfair to the defendant.

By Mr. TODD:

Q. What experience have you had in the purchase of real estate in the vicinity of Filbert street?

A. I purchased in 1880 three houses at 15th and Filbert, one at the northeast corner, on- adjoining, one adjoining that ag ain; three houses altogether.

Q. That, I believe, is within that class of properties which the passenger station has affected; but please go west of 16th street.
70 What experience have you had in the purchase of property there?

A. Between 22nd and 23rd I had two properties—small properties—only worth about $1,800 and $2,000.

Q. You sold those to the Pennsylvania railroad?

A. No; I did not.

Q. Have you still got them?

A. No; I sold them before; before 1879.

Q. They have since passed to the Pennsylvania railroad?

A. I am not able to say that. I do not know of my own knowledge.

Q. That was prior to 1879?

A. Yes, sir.

Q. How long prior?

A. I think about 1876; two or three years prior to 1879.

Q. Has there been any appreciation in properties since, say, December 6th, 1881, on Filbert street west of 16th?

A. I think, as I said before, the value of the ground as a location has appreciated. I think the value of the property as dwelling-houses has depreciated.

Q. Has the market value of the property been affected in anywise at all?

A. Yes, sir; I think the market value of the property since the elevated railroad has been placed there—that is, the dwelling-house property—has depreciated. I have said that. I do not think the market value of any of the manufacturing property there has been depreciated.

Q. The only improvements that have taken place there upon which you base that are the Gregg & Bowe place and number 1711,

that has been built up by Mr. Maule. There are no other improvements there, are there, west of 16th street?

A. Excepting two undertakers who have come there and
71 fixed up their houses very nicely.

Q. They have been there for a long while?

A. One of them, I think, since 1879.

Q. They came there before the railroad was built?

A. One of them did and one of them did not. Still, those two improvements that you allude to are very fine and very elegant improvements.

Q. The proximity of the railroad did not bring the undertakers there, did it?

A. I do not know about that. It may have given them publicity.

Q. Do you happen to know the difference in the assessment value of this property; have you taken the trouble to inquire?

(Objected to.)

Mr. TODD: The defendants agreed that that might be considered in evidence.

Mr. BISPHAM: I agreed that I might offer them if I chose.

Mr. TODD: But I can offer them under our agreement.

The COURT: That manifestly would not be a proper way.

Mr. TODD: I stipulated that whatever you should do I should have a right to do.

The COURT: This witness is called as an expert. It may be that the assessment is some evidence of valuation, and it may be one of the elements from which these gentlemen formed an estimate. You may ask him if he knows what the assessment is and whether he has taken that into consideration, but you must not ask him how much it is.

By Mr. TODD:

Q. Are you acquainted with the assessment of this property?

A. Yes, sir.

Q. Have you taken that into consideration in making up your judgment?

72 A. I have not. I find that assessments are so unreliable. I have found that out by experience, so that I do not take them into consideration.

Q. Which way does this assessment make—for you or against you?

(Objected to.)

The WITNESS: I did not say that one was unreliable.

By Mr. TODD:

Q. Is this one reliable or unreliable?

A. I do not say that. I say assessments are generally unreliable.

Q. You say that you know of the assessment, and you have con-

sidered the fact in arriving at the estimate which you make here now?

A. No; I said the contrary.

Q. Be kind enough to state what the difference in the assessment of this property was prior to the road being put there and subsequently to its construction.

The COURT: No; he will not answer that question.

Mr. TODD: I ask the question if he knows it.

The COURT: Whether he knows it or not he will not answer it.

Mr. TODD: I suppose it is objectionable on the ground of not being the best evidence. That would be one ground. Are you placing it upon that ground?

Mr. BISPHAM: I put it on any ground.

The COURT: It is not admissable as testimony, but it may be a means by which an expert arrives at a conclusion. He may have considered it and utterly disregarded it, as this witness has said.

Mr. BISPHAM: It is simply analagous to his knowing about the sales in the neighborhood.

Mr. TODD: If the gentlemen insist upon their objection I am satisfied.

Mr. BISPHAM: That is the ground upon which I put the objection—that it is not proper cross-examination.

73 JAMES M. STEWART, having been duly sworn, was examined as follows:

By Mr. BISPHAM:

Q. Where do you live?

A. 213 North 17th street.

Q. What is your business?

A. I am a carpenter and builder. That is my ostensible business.

Q. How long have you been engaged more or less in building?

A. 40 years.

Q. Are you acquainted with the values of property on Filbert street between 17th and 18th?

A. I am.

Q. What, in your judgment, was the value of the property 1711 Filbert street?

(Objected to.)

Q. State what opportunities you have had of becoming acquainted with the values of property in that square.

A. From my living in that neighborhood.

By Mr. TODD:

Q. State your general knowledge. Do you consider yourself a real-estate expert?

A. I do, in my way.

Q. Is that the way other people consider you?

A. I don't know.

Q. You don't know what other people think?
A. I have my own way of estimating the values of properties.
Q. You know when you get hold of a cheap thing and when you can sell it high, do you?
A. No; I don't know anything about that. I know how to figure the valuation of property.
Q. Is not your estimation based with regard to your busi-
74 ness as a builder?
A. Partly.
Q. It is not based upon real estate?
A. Partly; not entirely. I have bought and purchased.
Q. How much have you bought and purchased; how many properties?
A. I suppose perhaps eight or ten properties.
Q. Where are they located?
A. One in the Tenth ward.
Q. When was that?

The COURT: I do not understand that this witness is offered as a general expert.
Mr. BISPHAM: No, sir. He lives in the neighborhood, and is offered as a witness who has personal knowledge of this particular neighborhood and the property. Therefore the cross-examination should be confined to that.

By Mr. TODD (to the witness):

Q. What do you know about Filbert-street properties?
A. I have known that property for over 30 years.
Q. What transactions generally have you had in Filbert street?
A. I have bought on 20th near Filbert. I own property now and rent property on 20th near Filbert.
Q. How near Filbert?
A. Between Filbert and Market.
Q. Alongside of the Pennsylvania railroad?
A. Yes, sir.
Q. Between Jones street and Market?
A. Yes, sir.
Q. When did you get that?
A. I bought that property in 1856.
Q. Do you still own it?
A. Yes, sir.
75 Q. What other property have you had in that vicinity?
A. I bought and sold property on 23rd street above Callowhill.
Q. What other one have you had on Filbert street?
A. I have not bought or sold on Filbert street.
Q. And the only property in that vicinity is the one you bought in 1856, that you still own?
A. Yes, sir.

sidered the fact in arriving at the estimate which you make here now?

A. No; I said the contrary.

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Q. It is not based upon real estate?
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Q. Between Jones street and Market?
A. Yes, sir.
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Q. Do you still own it?
A. Yes, sir.
75 Q. What other property have you had in that vicinity?
A. I bought and sold property on 23rd street above Callowhill.
Q. What other one have you had on Filbert street?
A. I have not bought or sold on Filbert street.
Q. And the only property in that vicinity is the one you bought in 1856, that you still own?
A. Yes, sir.

By Mr. BISPHAM:

Q. You have been familiar with the values of property on Filbert street for the past 20 years?

A. Yes, sir, 30 years.

Q. You live in the neighborhood?

A. Yes, sir.

Mr. TODD: I do not think the witness' statement of his familiarity is sufficient. The matter is within the discretion of the court.

The COURT: Property may be valued just like anything else. A witness can testify to his knowledge of property, whether it be real estate or personal or anything else. A man may be so well acquainted with a particular locality as to know exactly the value of property in that locality without having knowledge of any other real estate in the city of Philadelphia, and if this witness choose he may give a valuation from personal inspection and personal knowledge of the property.

Mr. TODD: He is called as an expert.

The COURT: And expert is one who knows, and to the extent of his knowledge he is an expert.

Mr. TODD: If a man has knowledge of a particular locality he has undoubtedly a right to testify as to that locality, but the defendants should show the fitness of his witness.

The WITNESS: I know of sales of property on Filbert street.

76 By Mr. BISPHAM:

Q. Please state to the jury what, in your judgment, this property, 1711 Filbert street, was worth in 1879, before the elevated railroad came there.

A. I have put an estimated value on that house. I have separated the ground from the house. One of my ways of estimating is by finding the value of the ground and then the house.

Q. What did you find the value of the ground to be in 1879?

A. I considered the value of the ground there at $12 a foot. 20 feet front would make $4,000 for the ground.

Q. What, in your judgment, was the value of the dwelling?

A. I valued that dwelling at $6,000 in 1879.

Q. That would make the total value $10,000?

A. Yes, sir.

Q. What was the value in October, 1882? What effect, in your judgment, if any, had the building and operation of the elevated railroad upon the value of the property?

A. I calculated that that property in 1882 was worth about $8,300.

Q. How did you arrive at that?

A. Having knowledge of the rental values of property in that neighborhood and having rented property myself. I have also some knowledge of the depreciation by reason of the elevated railroad and also my own experience. I thought there was a depreciation there in that house of about $15 a month. That I gained from my own experience and knowledge of my own property and others.

Q. Was there any appreciation in the value of the ground? Was the value of the ground improved?

A. I estimated as though the ground had appreciated in value.

Q. And, taking both those things into consideration, you came to the conclusion that the property was worth in said October,
77 1882, $8,300?

A. Yes, sir.

Q. That is the way you get at it—from your knowledge of sales and rentals of property in the neighborhood, and from your experience as a builder?

A. Yes, sir.

Q. This dwelling-house or building has been taken away?

A. Yes, sir.

Q. And a seed store has been erected there?

A. Yes, sir.

Q. The value of the ground has enhanced?

A. Yes, sir.

Q. I suppose that is because of its availability for business purposes.

A. The premises were sold after they had commenced to improve for commercial and manufacturing purposes. The house was sold after they had commenced to put up buildings there for commercial purposes, and I considered in my estimate that there was an enhance- value in this property adjoining.

Cross-examination waived.

WILLIAM H. MAULE, having been duly sworn, was examined as follows:

By Mr. BISPHAM:

Q. Where do you reside?

A. Haverford college, Montgomery county.

Q. What is your business?

A. Garden-seed business.

Q. Where is your place of business?

A. 1711 Filbert street.

Q. You purchased from the Philadelphia Saving Society in 1885?

78 A. Yes, sir; at $8,000.

Q. I suppose you were familiar with the premises before the purchase?

A. Yes, sir.

Q. You went there and looked at them?

A. Yes, sir.

Q. Can you tell me what the condition of the house was as regards repair?

A. In rather poor condition.

Q. Can you tell the jury whether or not in paying that price for the property you took into consideration the value of the house or the value of the ground?

A. The value of the ground.

Q. Did you happen to know whether the house was or was not out of repair for some little time prior to that—had you been keeping an eye on the property?

A. No; I did not examine the house very particularly at all.

Cross-examination waived.

Testimony closed.

Charge of Court.

(FINLETTER, *J.*)

GENTLEMEN OF THE JURY: This is an action brought to recover damage arising by reason of the construction by the defendant of an elevated railroad along Filbert street, in this city.

There is but one question for you to determine, and that is, what has been the depreciation in the value of this property?

It has been admitted by the defendant that there was an injury to the property, fixing it at $2,000, the plaintiff, on the other hand, claiming it to be about $3,500, and this seems to be the difference between them.

79 It is for you to determine upon which class of the testimony, whether on the one side or on the other, you will rely in this case. It may be that you will rely upon neither, considering neither the one side nor the other, when you come to consider all the circumstances of the case exactly correct, and in that event you will draw your own conclusions.

In an estimate of damages of this kind the law has fixed the limits to which the parties, witnesses, and jury may go. The fair rule, as the law says, is to consider the value of the property immediately before and its value after the injury was inflicted, and, of course, the difference between those two values will be the amount of damages suffered.

As you understand, those pursuing any certain business are expected to understand that business better than others. The witness that you had heard are all gentlemen who have had, to a greater or less extent, very great experience in ascertaining and knowing the value of property all over the city of Philadelphia, and it is from just such witnesses that we are expected to get exactly or as near as human testimony can come to it the value of property at different times.

There seems to be a difference between these witnesses as to the value of the property in 1879, all of the plaintiff's witnesses fixing it certainly at $11,000, and, I think, one or two of them making it as high as $11,500, while the witnesses for the defendant, as I understand, fix it at $10,000.

You will see that it is not as important, perhaps, as at first sight you might be tempted to consider it, because, after all, the amount of damage or depreciation is the real question in issue. A witness might place the valuation of the property in 1879 at either a higher

or a lower figure than it ought to be and yet give just as
80 accurate an account or description of the damage done as one who differed more or less from him. However, that is one of the elements in ascertaining the damage in this case.

You are bound to consider the testimony on both sides as to what the property was worth before and after the coming of the railroad. As I understand, the witnesses for the plaintiff have fixed the damage at about $4,500, while the witnesses for the defendant, as I have already said, have fixed it at $2,000. Of course, when a witness on either side attempts to fix the amount of the depreciation or appreciation of a property he takes it as it was before the railroad and as it is after it has come there. So all of these elements go into the calculation.

However, as I have already said, the important question to be determined is, What was the real and substantial injury to the property? There is a difference, as I have already mentioned, between these two classes of witnesses, and it is not of so much consequence that they differ to a certain extent as to the value before and after the railroad came there.

Of course you must rely upon the evidence of these witnesses. You have a right to consider which class of them or which particular one of either class is the most reliable. That witness is the most reliable who has the most knowledge, experience, and skill, and who has given you the most reasonable and considerate opinion in the matter.

I really cannot help you by anything I might say upon this question, but simply ask you to consider the arguments of counsel on both sides as based upon the testimony, as they treated the matter very fairly, and to determine what you think, from a fair consideration of all the testimony, was the injury which this plaintiff suffered by reason of the construction of the railroad, it being admitted that there was at least $2,000 of damage.

81 Of course, upon whatever amount you may estimate the damages at the time of the sale, in 1882, to be you will allow interest from that time, October, 1882, to the present time, four years and one month.

Counsel for plaintiff except to the refusal of the court to charge upon that point submitted by them.

Counsel for plaintiff also except to so much of the charge as limits the period from which interest is to run to October, 1882.

MARCHANT
vs.
PENNSYLVANIA RAILROAD CO.

Defendant's Points.

1. The defendant under its charter and supplements in evidence had full lawful authority to erect and operate the Filbert-street extension or branch described in the declaration without incurring any liability by reason thereof for consequential damages to the

property of the plaintiff, the uncontradicted evidence being that none of the said property was taken by the defendant, but that the entire width of Filbert street intervenes between the railroad of the defendant and the nearest point thereto of the property of the plaintiff.

2. The defendant, as purchaser of the main line of the public works of this State, under the acts of assembly and deed in evidence, had full lawful authority to erect and operate the said Filbert-street extension or branch without incurring any liability to the plaintiff for alleged consequential damages to his property, the uncontradicted evidence being that none of the said property was
82 taken by the defendant, but that the entire width of Filbert street intervenes between the railroad of the defendant and the nearest point thereto of the property of the plaintiff.

3. The contracts contained in the charter of the defendant and the supplements thereto in evidence, as well as the contract contained in the acts of assembly and deed for the main line already mentioned, authorized the defendant to construct said extension or branch with liability for property taken only, and no subsequent legislation by this State can impair the obligation of those contracts or either of them by increasing the price of the exercise of the franchises granted by imposing an obligation to pay for property alleged to be injured but not alleged to have been taken.

4. The property of the plaintiff being separated from the railroad of the defendant by the entire width of Filbert street, a public highway of the city of Philadelphia of the width of 51 feet, there is no liability on the part of the defendant for alleged consequential damages to said property.

5. The uncontradicted evidence being that the property of the plaintiff is situated on the north side of Filbert street, a public highway of the city of Philadelphia, on the opposite side from the railroad of the defendant, which does not occupy any part of said street opposite the property of the said plaintiff and is erected wholly on its own property, being a distance of fifty-one feet therefrom, and there being no evidence that any of the property of the plaintiff was taken, injured, or destroyed by the construction of the said Filbert-street extension or branch, the verdict must be for the defendant.

6. The plaintiff's property being situate in a thickly built
83 portion of the city of Philadelphia and upon the opposite side of a frequented public highway, the defendant is not responsible for the consequences to the plaintiff's property of the proper and careful operation of its road.

7. Under all the evidence the verdict should be for the defendant.

WAYNE MACVEAGH,
For Defendant.

(Endorsed:) Marchant *v.* P. R. R. Co. Defendant's points. Refused ex. T. K. Finletter.

And thereupon the counsel for the said defendant did then and there except to the refusal of the said court to affirm the defend-

ant's points, and, inasmuch as the said charge and opinion so excepted to do not appear upon the record, the said counsel for the said defendant did then and there tender this bill of exceptions to the opinion of the said court and requested the seal of the judge aforesaid should be put to the same according to the form of the statute in such case made and provided; and thereupon the aforesaid judge, at the request of the said counsel for the said defendant, did put — seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this — day of ——, A. D. 18—.

T. K. FINLETTER. [SEAL.]

(Endorsed:) 133. September term, 1884. C. P. 3. Edward D. Marchant *vs.* Penna. R. R. Company. Bill of exceptions. Presented Nov. 16, 1886. T. K. Finletter. Approved. G. H. Van Zandt, att'y for pl'ff. M. H. Todd, Esq., per V. Filed Mar. 8, 1887. —— Clay, *pro* proth'y.

84 In the Supreme Court of Pennsylvania in and for the Eastern District.

Copy of Docket Entries.

No. 142. July term, 1887.

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
vs.
EDWARD D. MARCHANT, Defendant in Error. } 142.

Wayne McVeagh.

Surwrit of error to the court of common pleas No. 3 for the county of Philadelphia. Ret'ble the first Monday of January, 1888. Exit June 13, 1887.

December 29, 1887.—Record returned and filed.

Ec die, assignments of error file-.

March 19, 1888.—Argued.

April 9, 1888.—Judgment reversed. Opinion by Paxson, J. Sterrett, J., dissents and will file reasons.

April 10, 1888.—Remittatur exit and with record sent to Wayne McVeagh, Esqr.

April 23, 1888.—Dissenting opinion filed by Sterrett, J.

I hereby certify that the above and foregoing is a true and correct copy of the docket entries in the above-entitled case, so full and entire as appears of record in our said supreme court.

In testimony whereof I have hereunto set my hand and the seal of said court, at Philadelphia, this 21st day of April, 1890.

[SEAL OF S. C.] CHAS. S. GREENE,
Prothonotary,
Per LEWIS C. GREENE,
Pro Prothonotary.

Endorsed: No. 142. July term, 1887. Supreme court. Pennsylvania Railroad Company *vs.* Edward D. Marchant. Copy of docket entries.

85 In the Supreme Court of Pennsylvania for the Eastern District.

PENNSYLVANIA RAILROAD COMPANY
vs.
EDWARD D. MARCHANT. } No. 133.

Surwrit of error to the court of common pleas No. 3 for the county of Philadelphia, of September term, 1884.

Issue writ of error to the court of common pleas No. 3 for the county of Philadelphia to remove record and proceedings in a certain action in said court, No. 133, Sept. term, 1884, in which the said Edward D. Marchant is plaintiff and the said Pennsylvania Railroad Company is defendant.

Returnable to next term, *sec. reg.*

To Charles S. Greene, Esq., proth'y sup. c't.

WAYNE MACVEAGH,
For Plaintiff in Error.

COUNTY OF PHILADA., *ss:*

John P. Green, being duly sworn, saith the writ of error applied for and purchased in above-entitled case is not intended for delay.

JNO. P. GREEN.

Sworn and subscribed this 11th day of June, A. D. 1887.

AL. P. BURCHELL,
[NOTARY'S SEAL.] *Notary Public.*

86 In the Supreme Court of Pennsylvania for the Eastern District.

PENNSYLVANIA RAILROAD COMPANY
vs.
EDWARD D. MARCHANT. } No. 133.

Surwrit of error to the court of common pleas No. 3 for the county of Philadelphia, of September term, 1884.

We, the Pennsylvania Railroad Company and the Philadelphia Trust, Safe Deposit and Insurance Company, severally acknowledge to owe the above-named Edward D. Marchant the sum of nine thousand nine hundred and sixty dollars, upon condition that the above-named Penna. R. R. Co. prosecute its writ of error with effect; and, if the judgment be affirmed or the writ of error be discontinued or nonprossed, that it pay the debt, damages, and costs adjudged or accruing upon such judgment and all other damages and costs that may be awarded upon such writ of error, and for the return to the

court below of the record with the remittatur, or else we will do it for it.

[Seal of R. R. Co.]

THE PENNSYLVANIA RAILROAD CO.,
By JNO. P. GREEN, *Vice-president.*
Attest: D. S. NEWHALL, *Ass't Secretary.*

[Seal of T. Co.]

THE PHILADELPHIA TRUST, SAFE DEPOSIT AND INSURANCE COMPANY.
J. L. ERRINGER, *Pres't.*
Attest: E. D. SCHOLEY, *Ass't Secr'y.*

Taken and acknowledged this 13th day of June, A. D. 1887.
HAROLD P. NEWLIN,
Pro Proth'y.

Endorsed: 142. July T., '87. Penna. R. R. Co. *vs.* E. D. Marchant. Præcipe. Filed in supreme court Jun- 13, 1887.

87 EASTERN DISTRICT OF PENNSYLVANIA, *sct:*

The Commonwealth of Pennsylvania to the justices of the common pleas court No. 3 for the county of Philadelphia, Greeting:

Because in the record and process and in rendering the judgment in a certain plaint which was in our said court, before the judges of the same court, by our writ, between Pennsylvania Railroad Company, plaintiff in error, and Edward D. Marchant, defendant in error, as it is said, manifest error hath intervened, to the great damage of the said plaintiff in error, as by complaint of the said plaintiff in error we have received information, we, willing that, if any error be therein, it should be corrected and that speedy justice be done to the parties in this part, do command you that, if judgment, as it is said, be rendered in the said plea, then the record and process and all things touching the same, under your seals, distinctly and openly, you have before the justices of our supreme court of Pennsylvania, at a supreme court to be held at Philadelphia, in and for the eastern district of said Commonwealth, on the first Monday of January next, and this writ, that, the record and process aforesaid being inspected, we may further cause to be done what of right and according to our laws and customs ought.

Witness the Honorable Isaac G. Gordon, doctor of laws, chief justice of our said supreme court, at Philadelphia, the 13th day of June, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Commonwealth the one hundred and eleventh.

HAROLD P. NEWLIN,
Pro Prothonotary.

(Endorsed:) 133. Sept. T., 1884. No. 142. July term, 1887.
88 Supreme court. Pennsylvania R. R. Co., plaintiff in error, *vs.* Edward D. Marchant, defendant in error. Writ of error

to the court of common pleas No. 3 for the county of Philadelphia. Returnable the first Monday of January, 1888. Rule on the defendant in error to appear and plead on the return day of the writ. Brought into office June 14, 1887. Jas. W. Fletcher. Filed in supreme court Dec. 29, 1887. Wayne MacVeagh.

To the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the eastern district:

The record and process and all things touching the same, so full and entire as before us they remain, we certify and send as within we are commanded.

T. K. FINLETTER. [SEAL.]
JAMES GAY GORDON. [SEAL.]

I certify that the Pennsylvania R. R. Co. & the Philadelphia Trust, Safe Deposit & Ins. Co. are bail in error in the within case in the sum of nine thousand nine hundred and sixty, $9,960, dollars.

HAROLD P. NEWLIN,
Pro Prothonotary.

89 July Term, 1887. Supreme Court.

PENNSYLVANIA R. R.
vs.
EDWARD D. MARCHANT. } No. 142.

Specifications of Error.

First. The court below erred in not affirming the first point of the defendant.

First point. "The defendant, under its charter and supplements in evidence, had full lawful authority to erect and operate the Filbert-street extension or branch, described in the declaration, without incurring any liability by reason thereof for consequential damages to the property of the plaintiff, the uncontradicted evidence being that none of the said property was taken by the defendant, but that the entire width of Filbert street intervenes between the railroad of the defendant and the nearest point thereto of the property of the plaintiff."

Second. The court below erred in not affirming the second point of the defendant.

Second point. "The defendant, as purchaser of the main line of public works in this State under the acts of assembly and deed in evidence, had full lawful authority to erect and operate the said Filbert-street extension or branch without incurring any liability to the plaintiff for alleged consequential damages to his property, the uncontradicted evidence being that none of the said property was taken by the defendant, but that the entire width of Filbert street intervenes between the railroad of the defendant and the nearest point thereto of the property of the plaintiff."

Third. The court below erred in not affirming the third point of the defendant.

Third point. "The contracts contained in the charter of the defendant and the supplement thereto in evidence, as well as
90 the contract contained in the acts of assembly and deed for the main line, already mentioned, authorized the defendant to construct said extension or branch with liability for property taken only, and no subsequent legislation by this State can impair the obligations of those contracts or either of them by increasing the price of the exercise of the franchises granted by imposing an obligation to pay for property alleged to be injured, but not alleged to have been taken."

Fourth. The court below erred in not affirming the fourth point of the defendant.

Fourth point. "The property of the plaintiff being separated from the railroad of the defendant by the entire width of Filbert street, a public highway of the city of Philadelphia of the width of fifty-one feet, there is no liability on the part of the defendant for alleged consequential damages to said property."

Fifth. The court below erred in not affirming the fifth point of the defendant.

Fifth point. "The uncontradicted evidence being that the property of the plaintiff is situated on the north side of Filbert street, a public highway of the city of Philadelphia, on the opposite side from the railroad of the defendant, which does not occupy any part of said street opposite the property of the plaintiff, and is erected wholly on its own property, being a distance of fifty-one feet therefrom, and there being no evidence that any of the property of the plaintiff was taken, injured, or destroyed by the construction of the said Filbert-street extension or branch, the verdict must be for the defendant."

Sixth. The court below erred in not affirming the sixth point of the defendant.

Sixth point. "The plaintiff's property being situated in a
91 thickly built portion of the city of Philadelphia and upon the opposite side of a frequented public highway, the defendant is not responsible for the consequences to the plaintiff's property of the proper and careful operation of the road."

Seventh. The court below erred in not affirming the seventh point of the defendant.

Seventh point. "Under all the evidence the verdict should be for the defendant."

WAYNE MACVEAGH,
For Plaintiff in Error.

Endorsed: No. 142. July term, 1887. Supreme court of Pa. Penna. R. R. Co. *vs.* Edward D. Marchant. Specifications of error. Filed in supreme court Dec. 29, 1887. MacVeagh.

92 (*Copy of Opinion.*)

THE PENNSYLVANIA RAILROAD COMPANY *vs.* EDWARD D. MARCHANT. } E. D. Error to C. P. No. 3.

Filed April 9, 1888.

PAXSON, *J.:*

This case is admittedly upon all fours with Pennsylvania Railroad Company *vs.* Lippincott, argued and decided at the last term of the court in the eastern district, 116 Pa., 472. If that decision is to stand, the present case will have to be reversed, as they are in direct conflict. It is only just to the learned judge below to say that when this case was tried the decision in Railroad Company *vs.* Lippincott had not been decided, nor had it been argued here. Two of our number dissented in that case, and two of those who heard the present case did not hear the former. I was abroad at the time and our brother Williams was not then a member of the court. In view of these facts and of the grave character of the question involved, we have listened to an elaborate argument involving the same question and have carefully reconsidered it. It has not had the effect, however, of producing any change in the views of the majority of the court. We adhere to the ruling in Railroad Company *vs.* Lippincott, as announced by our brother Gordon. The ground was so fully covered by his opinion that this judgment might well be reversed without a further discussion of the principles involved. I concur fully in the views already expressed and can hardly hope to throw additional light upon the matter or to strengthen the argument already made. In view of the fact, however, that we listened to what was practically a re-argument, I will add a few words, by way of supplement, to the previous opinion of our brother Gordon, even at the risk of some repetition.

93 The plaintiff below is the owner of property on the north side of Filbert street and brought this action to recover damages for an alleged injury to said property caused by the operation of the defendant's elevated road. The latter is constructed upon land owned by the company, and the entire width of Filbert street intervenes between the railroad and plaintiff's house. He complains of the noise, the dust, smoke and cinders, and the constant jar caused by the passing trains. He says that these causes combined interfere with the enjoyment of his property and lessens its market value. For the purposes of this cause we must consider his allegations established by the verdict of the jury.

The plaintiff claims to recover by virtue of the constitution of 1874, section 8 of article XVI of which provides that "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which com-

pensation shall be paid or secured before such taking, injury, or destruction."

It was held in Railroad Company *vs.* Lippincoot that the effect of this clause of the constitution was to place corporations upon the same plane with individuals as regards liability for injuries to property, and that it only made a corporation liable where an individual was liable at common law. The correctness of this ruling was conceded by the learned counsel for the plaintiff. He says at page 13 of his printed brief: "We ask for no other or greater liability to be imposed upon this railroad company than would be imposed upon an individual in like circumstances." As, however, other counsel in other cases may not concede so much, I will add a few words to this branch of the case.

If we resort to the familiar rule of interpreting statutes—the old law, the mischief and the remedy—we have no difficulty in
94 arriving at the true construction of the language cited from the constitution. Prior to 1874 the citizen whose property was injured by a corporation in the construction of its works had no remedy therefor unless some portion of his property was actually taken. This was an immunity enjoyed by corporations and not by individuals. Cases of great hardship soon arose. O'Conner *vs.* The City of Pittsburg, 8 Pa., 187, was one of these. In that case the city by the change of the grade of a street practically ruined a valuable church property. Yet there was no remedy. This court of its own motion ordered a re-argument of that case "in order to discover if possible," in the almost pathetic language of Chief Justice Gibson, "some way to relieve the plaintiff consistently with law, but I grieve to say we have discovered none." Instances of a like nature might be cited indefinitely. I have selected this one as an illustration of the principle and as perhaps one of the most striking. In all of them, however, there was an injury to the property of the plaintiff in consequence of the erection or construction of the works of the corporation, as by the change of grade in O'Conner *vs.* Pittsburg, and the interference with water rights, as in Monongahela Navigation Company *vs.* Coons, 6 W. & S., 25, 101. In all these cases the property had been seriously injured, and yet no portion of it taken by the offending corporation.

This was the mischief which the constitutional convention had before it when section 8 of article XVI was adopted by that body, and it was the evil the people were smarting under when they ratified the work of the convention at the polls. The constitution since 1790 had declared that the property of the citizen should not be taken or applied to public use without just compensation. The constitution of 1874 went further, and declared not only that it shall not be taken, but also that it shall not be injured or
95 destroyed by corporations in the construction or enlargements of their works without making compensation, &c., &c. There is no ambiguity in this language. We have applied it several times to cases arising under it without the least difficulty. We are now asked to apply it, not to injuries to the plaintiff's property arising from the construction of the defendant's road, but

to injuries resulting from the lawful operation of their road without negligence.

Before I proceed to discuss this branch of the case, in order that we may know exactly where we stand, I will refer briefly to the cases we have decided under this clause of the constitution of 1874.

The City of Reading *vs.* Althouse, 93 Pa., 400, was a case where certain springs or streams of water had been diverted from their usual course to supply the city with water. By the act of April 14th, 1853, applying to the Reading Water Company, it was provided that where the corporation permanently appropriated to its use such springs or streams as it might select for water purposes compensation should be made to the owners for damages sustained. In an action against the city by a riparian owner whose stream had been diverted we held not only that the action could be sustained under the above act of 1853, but also that it could be maintained under section 8 of article XVI of the constitution. In referring to this section it was said by Mr. Justice Gordon: "That section provides for the making of compensation, not only for the taking of private property for public use, as was the case theretofore, but also for its injury or destruction; that the use which the plaintiff made of the waters of the Great or *Sutietam* creek, through the race or ditch in controversy, was property, though of an incorporeal kind, is not open to debate, and that it was injured by the operations of the city of Reading is a fact established by the proper tribunal.
96 There is therefore no good reason apparent to us why the case should not be covered by the above-recited eighth section of the constitution."

In The Borough of New Brighton *vs.* United Presbyterian Church, 96 Penna., 331, we had a case before us like O'Conner *vs.* Pittsburg and differing only in degree. The borough had changed the grade of a street from two feet and a half in some places to fifteen feet in others, and we held that a property-owner injured thereby had a right to damages for said injury under the constitution of 1874, although no such right existed before.

Philadelphia and Reading Railroad Company *vs.* Patent, 17 W. N., 198, was a case in which the said company, as the lessee of another railroad company, changed the alignment of the tracks of said leased railroad in a certain street in the borough of Manayunk, thereby obstructing the access to a private house fronting thereon and causing other consequential injury thereto. In an action on the case against the company to recover damages for such injuries it was held that, while the plaintiff was entitled to recover upon other grounds, the case came nevertheless within the constitution of 1874.

In Pennsylvania Railroad *vs.* Duncan, 11 Pa., 352, the plaintiff was allowed to recover in an action on the case for damages to his property caused by the construction of the defendant's road. The road was so near his property as to deprive him of the use of Filbert street as a highway and of four hundred feet of building front on said street. It is true Justice Green and myself dissented in that case, but it was upon the single ground that the company had paid

$7,000,000 to the State for its property and franchises, had succeeded to all the rights of the State, including the right to construct its road with liability for consequential injuries, and we were unable to see how the State could avoid its contract by amending its
97 constitution; but we were all of opinion that but for this single reason the case came clearly within the constitution of 1874.

County of Chester *vs.* Brower, 20 W. N., 431, decided at the present term, was a case where the county had erected a bridge over French creek, in the borough of Phœnixville, and in the construction of the abutments or approaches to the bridge had built a wing wall nine feet six inches in height immediately in front of plaintiff's houses and only seven feet distant therefrom, thereby seriously interfering with his access thereto and his reasonable use and enjoyment of the same. We held, reversing the court below, that the plaintiff was entitled to recover damages for this injury in an action on the case. This was following directly in the line of The Railroad Company *vs.* Duncan. It will be observed that they are all cases where the injury arose from the construction of the road. In no one of them was there a claim for what are popularly called consequential damages arising from the operation of the road after its completion.

It will be noticed that all our cases decided prior to the constitution of 1874 in which compensation was denied for what are called consequential injuries were instances in which the injuries were the result of the construction of the road, while all our cases decided since 1874 and which came under the section thereof referred to likewise involved only injuries resulting from construction. The only exception is the case of Pennsylvania Railroad Company *vs.* Lippincoot, before referred to, and two or three other cases resting upon the same principle and which were argued and decided with it and in each of which the right to recover was denied.

The question whether under the constitution of 1874 a corporation is responsible not only for property taken, injured, or destroyed
98 in the construction or enlargement of its works, but also for injuries or inconveniences the result merely of the operation of its works is a question of such supreme importance and of consequences so far-reaching that we approach its discussion with caution. If it is the mandate of the constitution it must be obeyed. It is our duty to give effect to the will of the people lawfully expressed, and we shall perform it though it stops every wheel in the Commonwealth. But it is no part of our duty to write into the constitution something which the people have not placed there.

Just here it is proper to say there is not a word about "consequential" injuries in the constitution. The word itself has acquired a broad, popular meaning by which many persons may be misled. In judicial proceedings it should be used intelligently and with due regard to its proper meaning. In its application to the constitution we understand it to mean an injury to a man's property, the natural and necessary result of the construction or enlargement of its works by a corporation, an injury of such certain character that the dam-

ages therefor can be estimated and paid or secured in advance as provided in the constitution; and attention is again called to the cases which I have cited and in which the constitutional provision has been invoked and in all of which there has been an actual, positive, visible injury, the necessary result of the original construction.

In considering a new question it is sometimes useful to carry it out to its logical conclusion and see where it leads us to. It is true the *argumentum ab inconvenienté* is entitled to but little force in the face of a plain mandate of the constitution; but it is a persuasive argument in construing language which is capable of more than one interpretation, and especially is it so when we are asked to amend the constitution by a judicial decree.

99 If we hold that property-owners on Filbert street are entitled under the constitution to recover for the injuries complained of in this case—in other words, that it embraces injuries the sole result of the lawful operation of the defendant's road—where are we to stop in its application? Where is the line to be drawn? If property-owners on Filbert street may recover, why not those on Arch street and Race, and so on north and south, east and west, so far as the whistle of the locomotive can be heard and its smoke can be carried? The injury is the same; it differs only in degree; and it does not stop here. The constitution does not apply to railroads merely. It affects all corporations clothed with the power of eminent domain, including cities, boroughs, counties, and townships. It is applicable to canals, turnpikes, and other country roads. If by judicial construction we extend the constitution to all the possibilities resulting from the lawful operation of a public work, to all kinds of speculative and uncertain consequential injuries, we shall find ourselves at sea without chart or compass to guide us. Were we to adopt such a construction we would be compelled to use the language of Chief Justice Shaw in Proprietors of Locks and Canals *vs.* Nashua & Lowell Railroad Company, 10 Cushing, 385, to extend it "to turnpikes and canals *to* value of which is diminished or destroyed by loss of custom; to taverns and public houses deserted or left in obscurity; to stage-coach proprietors and companies; to owners of dwelling-houses, manufactories, wharves, and all other real estate in towns and villages from which the line of travel has been diverted. If it can extend to the next estate beyond the one crossed or touched by the railroad, why not to the next and the next, which may be affected less in degree but in the same manner?"

100 It is very plain to our view that the constitutional provision was only intended to apply to such injuries as are capable of being ascertained at the time the works are being constructed or enlarged, for the reason, among others, that it requires payment to be made therefor or security to be given in advance. This is only possible where the injury is the result of the construction or enlargement, for how can injuries which flow only from the future operation of the road and which may never happen be ascertained in advance and compensation made therefor?

It remains to say that if the construction of the constitution con-

tended for be correct, then we have a liability imposed upon corporations in the operation of their works which is not now and never has been imposed upon individuals. No principle of law is better settled than that a man has the right to the lawful use and enjoyment of his own property, and that if in the enjoyment of such right, without negligence or malice, an inconvenience or loss occurs to his neighbor it is *damnum absque injuria*. This must be so or every man would be at the mercy of his neighbor in the use and enjoyment of his own. In the late case of The Pennsylvania Coal Company *vs.* Sanderson, 113 Pa., 126, it was said by our brother Clark: "Every man has the right to the natural use and enjoyment of his own property, and if whilst lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor it is *damnum absque injuria*, for the rightful use of one's land may cause damage to another without any legal wrong." No man is answerable in damages for the reasonable exercise of a right when it is accompanied by a cautious regard for the right of others, where there is no just ground for the charge of negligence or unskilfulness, and when the act is not done maliciously. Pauton *vs.* Hollan, 17 Johns., 99. We need not
101 consume time by the further citation of authorities for so plain a proposition. It is settled law.

It was not contended that the injuries of which the plaintiff complains are in any degree the result of the negligent or unskilful operation of defendant's road. On the contrary, they have expended many millions to enable them to handle their business and convey their passengers and freight into the heart of the city with the least possible annoyance to persons and injury to property. As was well observed by our brother Gordon in The Railroad Company *vs.* Lippincott, the company might have hauled their enormous freight in carts or drays along Filbert street to its present terminus, and no one would have had a legal cause of complaint, though it is easy to see that the condition of property-owners on that street would have been far more intolerable in such case than it is at present.

This brings us to the question whether in case a natural person were the owner of this road, and were operating it in the manner that the defendant company are now doing, he would be responsible to the plaintiff in damages. We answer this question in the negative. He would not be responsible for the reason above given, viz., that he would have a right to the reasonable use and enjoyment of his property, and if in such use, without negligence or malice, a loss unavoidably falls upon his neighbor he is not liable in damages therefor.

It is true this principle is qualified to a certain extent. A man may not carry on a business which poisons the air and renders it unhealthy in a thickly populated neighborhood, and especially in the center of a large city. For establishments which involve danger, such as powder mills, injuries to health, such as lead works and manufactories of various kinds which involve noise and dis-

turbance to neighbors, a man must seek a secluded place,
102 where as few persons may be inconvenienced as possible. These exceptions to the general rule are well established and need not be further dwelt upon. But they have no application to the case in hand. The necessities of a railroad company and the character of its business compel it to seek the heart of a great city. This is as much for the convenience of the public as for its own. Hence the transportation of passengers and freight as near to the center of a town as possible is in the direct line its duty, whether that duty be performed by a corporation or individual. It is a part of the lawful use and enjoyment of property, and where it is done without negligence entails no legal liability therefor.

The proper use of such a work as this is a matter of great public concern. That it may also put money in the treasury of a corporation is aside from the question. The fact remains that it is a great public benefit, essential not only to the success of the business interests of the city, but to other cities and other places as well. It is a metallic nerve which thrills and *vitiates* from one end of this vast country to the other. There are some inconveniences which, as was decided in Pennsylvania Coal Company *vs.* Sanderson, must be endured by individuals for the general good: otherwise we would have an Utopia, where the whistle of the locomotive, the hum of the spindle, and the ring of the hammer are never heard. It might be pleasant to dwell where there is nothing to offend the eye, the ear, or any of the senses, but in this age of rapid development in every branch of industry it would be difficult to find such a spot in the vicinity of our large cities. We understand the word "injury" (or injured), as used in the constitution, to mean such a legal wrong as would be the subject of an action for damages at common law. For such injuries both corporations and individuals now stand upon the same plane of responsibility.

103 That I am correct in the meaning we attach to the word "injured" appears abundantly by our own authorities. This was clearly shown by our brother Gordon in Railroad Company *vs.* Lippincott. In addition to the authorities there cited by him, I will add Lehigh Bridge Company *vs.* Lehigh Coal and Navigation Company, 4 Rawle, 23; Pittsburg & Lake Erie Railroad Company *vs.* Jones, 11 Pa., 204.

It is not necessary for us to look outside of our own State for authorities in construing our own constitution. It may not be out of place, however, to say that in England, where they have statutes containing provisions bearing a close analogy to our constitution and which give damages to persons whose property though not taken is yet "injuriously affected by the construction" of public works, such damages are not extended to injuries resulting from the operation of the road. It was said by Lord Westbury in Ricketts *vs.* Railway Company, L. R., 2 Eng. & Irish Appeals, 198:" "I agree with the distinction that has been taken between damage resulting from the railway when complete or from the act of making it and damage occasioned by the proper (not negligent) use of the railway when made. No claim can be made for loss resulting from

the use of a railway. * * * Compensation is given by the statute only to individuals who, in respect of the ownership or occupancy of lands or tenements, sustain loss in or through the construction of the railway or the execution of the incidental works." To the same point are Hammersmith & City Railway Company *vs.* Brand, L. R., 4 Eng. & Irish Appeals, 171; Caledonian Railway Company *vs.* Walker, L. R., 7 Appeal Cases, 259; Penny *vs.* Southeastern Railway Company, 7 E. & B., 660; Glasgow Union Railway Company *vs.* Hunter, L. R., 2 Scotch & Div. Appeals, 78.

The language of the constitution is not equivocal and is
104 entirely free from ambiguity. The framers of that instrument understood the meaning of words, and many of them were among the ablest lawyers in the State. Two of them occupy seats upon this bench. Hence when they extended the protection of the constitution to persons whose property should be injured or destroyed by corporations in the construction or enlargement of their works we must presume they meant just what they said; that they intended to give a remedy merely for legal wrongs, and not for such injuries as were *damnum absque injuria*. Among the latter class of injuries are those which result from the use and enjoyment of a man's own property in a lawful manner without negligence and without malice. Such injuries have never been actionable since the foundation of the world.

Judgment reversed.

STATE OF PENNSYLVANIA, *Eastern District,* } *ss:*

I, Charles S. Greene, prothonotary of the supreme court of Pennsylvania in and for the eastern district, do hereby certify that the above and foregoing is a true copy of the opinion in the above-entitled cause so full and entire as appears of record in said court.

Seal of Sup. Court of Pennsylvania.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Philadelphia, this 10th day of April, A. D. 1888.

CHAS. S. GREENE,
Prothonotary.

(Endorsed:) 133. Sept. T., 1884. C. P. 3. Filed Apr. 11, 1888. C. B. Roberts, *pro* proth'y.

105 (*Copy of Dissenting Opinion.*)

PENNSYLVANIA RAILROAD CO. *v.* EDWARD D. MARCHANT. } Error, C. P. No. 3, Philada. No. 142. July T., 1887.

Filed Apr. 23rd, 1888.

Dissenting opinion.

STERRETT, *J.:*

This contention, involving the same questions that were presented in Pennsylvania Railroad Co. *v.* Lippincott and others, 116 Pa., 472,

hinges on the construction of article XVI, section 8, of the constitution, viz: "Municipal and other corporations and individuals, invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed in the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction."

In effect the obligation thus ordained is written into every grant of power to take private property for railroad purposes or for other specified public use, and requires the grantee of that privilege to make just compensation, not only for property actually taken (as was the case under former constitutions), but also for property injured or destroyed in consequence of the legitimate exercise of the grant, in the manner and for the purposes contemplated by the charter of the company. Pennsylvania Railroad Co. *v.* Duncan, 111 Pa., 352. If it is insisted on, that compensation must be paid before such injury or destruction. We have accordingly held very recently, in O'Brien *v.* Pennsylvania -- Schuylkill Valley Railroad Co., 21 W. N. C., 141, that if compensation for such consequential injury to adjacent real estate be not paid or secured in advance, suit may be brought immediately after the work is under-
106 taken, in which all damages, past as well as prospective, may be recovered; that the injury, for which the constitutional remedy has been provided, is single and indivisible, and, consequently, only one action will lie therefor.

The injury to private property (no part of which is actually taken) resulting from carrying out with reasonable and proper care the public purposes for which a corporation is created and invested with the right of eminent domain is regarded in the nature of a servitude fastened on the injured property by the *locum tenens* of the Commonwealth for the public benefit, for which compensation is to be made in advance and once for all. The constitution places such claims for compensation on precisely the same footing as claims for damages resulting to private property from an actual taking of a part thereof for public use.

The history of the section under consideration and the evils intended to be remedied thereby are too generally familiar to require extended notice, but in view of the importance of the subject it may be well to state briefly how the provision in its present form came to be incorporated in the constitution.

Under the provisions of the common law every public improvement was preceded, if necessary, by a writ of *ad quod damnum* to ascertain what damages, if any, subjects of the crown would sustain thereby (1 Black. Com. 139), but Penn's concessions of 1681 (3 Yeates, 372) had the effect of so relaxing that wholesome rule that compensation for private property taken for such public purposes as turnpikes, &c., was provided for, if at all, by the legislature as matter of grace and not of right. The- followed the constitutional guaranty of the people themselves, substantially reordained in 1838, prohibiting their representatives from investing "any

corporate body or individual with the privilege of taking
107 private property for public use without requiring such corporation or individual to make compensation to the owner or owners of said property or give adequate security therefor before such property shall be taken." Cons., 1838, article VII, section 4. In the absence of special charter obligation or legislative provision, more comprehensive and stringent than the section just quoted, corporations were not liable for anything short of an actual taking. In other words, without such taking they were never liable, under that section, for what are termed consequential damages. Cases of extreme hardship arose in which private property, no portion of which was taken, was greatly damaged in consequence of the lawful exercise of corporate authority delegated for public purposes. Monongahela Navigation Co. *v.* Coon, 6 W. & S., 101, and O'Conner *v.* Pittsburg, 18 Pa., 189, are illustrations of this. In the former the company, under legislative authority, constructed dams in the Monongahela river, one of which caused backwater for several miles in a tributory of that river and greatly injured Coon's mill located thereon. This court, reversing the judgment obtained by him for the damages, said: "The plaintiff's mill was not taken or applied, in any legitimate sense, by the State or by the company invested with its power, nor can it be said that he was deprived of it. The State is not bound beyond her will to pay for property which she has not taken to herself for public use." Subsequently, however, the legislature provided a remedy under which the owner of the mill was compensated for the damages resulting from the construction and maintenance of the dam. Mon. Nav. Co. *v.* Coon, 3 Pa., 379.

O'Connor *v.* Pittsburg was a case of still greater hardship. Chief Justice Gibson, declaring "it is inequitable to injure the property of an individual for the benefit of the many," and suggesting
108 that the legislature should provide a remedy, said: "To attain complete justice every damage to private property ought to be compensated by the State or corporation that occasions it, and a general statutory remedy ought to be provided to assess the value. The constitutional provision for the case of private property taken for public use extends not to the case of property injured or destroyed, but it follows not that the omission may not be supplied by ordinary legislation. No property is taken in this instance; but the cutting down of the street consequent on the reduction of its grade left the building useless and the ground on which it stood worth no more than the expense of sinking the surface of it to a common level. The loss to the congregation is a total one, while the gain to the property-holders in the neighborhood is immense. The legislature that incorporated the city never dreampt that it was laying the foundation for such injustice; but as the charter stands it is unavoidable."

This is perhaps the first appeal that came from the bench in behalf of the necessity for some general provisions requiring compensation for property "injured or destroyed," in addition to the then existing remedy for property actually taken for public use; and while no general measure of relief was provided by the legislature,

the subject was never lost sight of by the people until it was incorporated in the present constitution.

When the constitution of 1838 was adopted railroads were in their infancy, but they soon multiplied rapidly, and the legislature, in providing liberally for their needs on the one hand, and for the protection of private property rights, to some extent, on the other, enacted laws by which a mode of compensation was provided, not only for property taken, but also for injuries resulting to the residue of a property, part of which only was taken for railroad pur-
109 poses. These, together with similar provisions in special cases, were a great advance on the constitutional guaranty of 1838, which, as we have seen, required compensation only for property actually taken, but they left unprovided for cases of direct and serious injury and damage to adjacent private property, no part of which was actually taken for public use; and when the people resolved to change their organic law they determined to provide specially not only for that omission, among others, but also to place the whole subject beyond the control of their representatives in the legislature. No one familiar with the history of the times or who reads the debates in the constitutional convention can for a moment doubt the accuracy of this statement.

Referring to the justice and necessity of requiring compensation for damages to adjacent property, no part of which is taken resulting from the construction and careful operation of railroads, a distinguished delegate from Philadelphia said: "When a railroad runs through a man's property, close to his barn or house, you take into view the disadvantages caused by the close proximity of the road, the danger of fire, the annoyance from sparks, smoke, &c.; but if the road was not to run through the man's property, but near it, no matter what injury to his property, he would get just nothing." 3 Debates, 589. The rule as to measure of damages, here referred to, is the familiar one adopted in Schuylkill Navigation Co. *v.* Thoburn, 6 S. & R., 411, and recognized in so many of our cases, among the last of which is Railroad Co. *v.* Setzler, 112 Pa., 56, namely, the difference between what the property would have sold for before the construction of the road and what it would have sold for after the road was completed, taking into consideration the risk of fire necessarily incident to the proper and legitimate use of locomotives and all such matters as, owing to the peculiar location of the road, may affect the convenient use and future enjoyment of the
110 property and excluding everything of a speculative nature.

On the same subject the distinguished president of that body said: "There is no reason why a man in the neighborhood of a public work, injured by the construction of it, should not recover damages just as much if his property is not taken as if it is. For instance, the corner of a man's farm is taken; he comes for damages. What is the injury done to him by that in the taking of his property? It is the value of the part of the farm taken, but the value of the whole has been injured—that is, his property in the vicinity of the work has been injured. He recovers damages every day for that, and yet if it so happens that they must go just an inch outside of the corner

of his farm and he may be equally injured, he cannot under this blind clause, as I may call it, in our present constitution recover a dollar of damages. Sir, let us try and regulate that and restore it to the reason and the experience and protection of the common law by providing that when these wroks are made the property injured by them, whether part of that property is taken or not, shall be entitled to recover damages—that is, if the value of the property in the neighborhood is depreciated its owners shall recover the difference between what the property would have sold for before the work and what it would sell for afterwards." 3 Debates, 597.

The learned gentlemen not only "understood the meaning of the words," but they accurately voiced the views and purposes of those who framed the section in question and also of the people by whom it was ratified.

Another phase of the evil just referred to was the injury to abbutting-property owners by the authorized location and maintenance of railroads on streets and other public highways. In a long line of cases, prior to the adoption of the present constitution, commencing with the Philada. & Trenton Railroad Co., 6
111 Whart., 25, it was held that the constitutional provision of 1838 did not prohibit the legislature from granting to a railroad company the privilege of constructing and operating a railroad on public streets or highways without requiring compensation to be made to abbutting-property owners, and however much their property might be injured and depreciated in consequence thereof they were without redress. Cleveland and Pittsburg Railroad Co. *v.* Speer, 56 Pa., 325, is a case in which a verdict for $1,362.50 damages caused by noise, smoke, offensive smell, &c., whereby plaintiff was deprived of the proper enjoyment of his dwelling, &c., was set aside because the railroad company was lawfully occupying the street without any obligation to make compensation for any injury resulting from the legitimate operation of its road.

These are some of the evils that called loudly for a constitutional remedy; and, from the history of the section adopted and everything connected therewith, it is perfectly clear that it was the purpose of its framers, as well as the people they represented, to prevent the building of railroads or the prosecution of any great public enterprise at the involuntary expense or sacrifice in property of any private citizen either for construction, maintenance, or operation. This is so plainly written on every page of that history that the wayfarer, though not learned in the law, cannot fail to read and understand.

In view of all the foregoing and other considerations, it was deemed just and equitable to make general and permanent provision for compensation for property injured or destroyed without actual taking, as well as for property taken for public use. The result was the adoption of the 8th section first above quoted. As we have already seen, it differs materially from the old provision, not only in form, but in comprehensiveness. While the former is
112 merely an inhibition of the legislative power to delegate the right of eminent domain, the latter, without restricting the

exercise of that power, defines a class of persons, artificial and natural, and makes it obligatory on them to compensate the owners of property either taken, injured, or destroyed in the lawful prosecution of the work or business for which they are respectively invested with the right of taking private property for public use.

From what has been said it might appear strange there should ever have been any serious difference of opinion as to the meaning of the section; but, while those affected by it knew they were bound as before to pay for property actually taken, there was a backwardness on the part of some in recognizing the just measure of their obligation to persons whose property had been injured but not taken by them in the exercise of their corporate authority, and accordingly several cases arose involving the question of liability for injuries to the residue of property part of which had been taken, and also cases grounded solely on injuries to adjacent private property without any taking. Pusey *v.* Allegheny City, 98 Pa., 522, is an instance of the former. In that case, after reciting the section under consideration, it is said: "This is an advance upon the limitation of the right of eminent domain as found in the bill of rights both of the present constitution and that of 1838. Corporations in whom the legislature has vested this right are by this section made liable for damages resulting to private property from the construction, use, or alteration of their works, ways, or improvements; in other words, to such damages as are ordinarily called consequential. This being now the supreme law of the land, it must govern the case under consideration, and it is idle to recur to decisions and legislation the authority of which, as to all present and future cases, is by this provision annulled."

Other cases of same class might be cited in which the
113 same construction is recognized and adopted, viz., that compensation is to be made for injuries resulting from the use of operation as well as from the construction or enlargement of public improvements, but it is unnecessary. That construction had become so generally understood and acquiesced in that, in Penna. Railroad Co. *v.* Duncan, *supra*, a case grounded solely on injury resulting partly from construction, but chiefly from legitimate operation of the railroad, counsel did not think worth while to insist on the position that the constitution makes no provision for injuries resulting from operation, but only from construction of the road, strictly considered. The property in that case, shown to have been injured to the extent of $20,000, almost exclusively by the operation of the road, is also situated on the north side of Filbert street near the company's viaduct, but, like the plaintiff's in this case, no part of it was taken or even touched by the railroad. The case was confessedly on- in which plaintiff would have been utterly remediless except for the word "injured" in the section under consideration.

Junction Railroad Co. *v.* McCutcheon, 18 W. N. C., 527, was also a case involving simply the question of injury without any taking whatever. The plaintiff below was tenant for a term of years of the property injured by the construction and legitimate operation of the company's elevated road in the city of Pittsburg. Under the old

constitution he would have been absolutely remediless. The action as amended and tried was a case grounded solely on the word "injured." There was a verdict in his favor for $1,116, and on writ of error to this court the judgment was affirmed in a *per curiam* opinion by the present chief justice, in which it is said *inter alia*:

"Under the new constitution the plaintiff was entitled to com-
114 pensation for all the damages, direct and consequential, which he suffered or might suffer in consequence of the building and operation of defendant's road." The word operation was not inadvertantly used in that case. The plaintiff's claim for damages, like the claim in Railroad *v.* Duncan, *supra*, depended almost entirely on the question whether the company was liable for injuries resulting from the use or operation of its road. All the rulings of the court, so far as they were excepted to and assigned for error, were affirmed. One of them was the refusal of the court to charge as requested: "That no damages can be recovered in this action for injuries resulting from the operation of the road after its construction." Another was the refusal to charge "that damages arising from noise, smoke, and dirt in the passage and repassage of trains upon the road are not to be taken into consideration in estimating plaintiff's damges in this case." Another was in charging that "the ordinary danger from accidental fires to the buildings, not resulting from negligence, and generally all such matters as owing to the peculiar location of the road may affect the convenient and future enjoyment of the property are proper subjects for consideration."

These and other rulings to the same effect and in full accord with previous deliverances of this court were affirmed without dissent. They are quoted at some length because the elements of damages and the principles involved are, in my judgment, identically the same as in the present case and the cases of Penna. Railroad Co. *v.* Lippincott and others, *supra*.

The present suit was brought by the owner of house and lot No. 1711, fronting on the north side of Filbert street, Philada., to recover damages for injuries resulting from the construction and legitimate use of the company's viaduct or elevated railroad as a public highway for the transportation of passengers and freight.

115 The road known as the Filbert-street extension commences near 32nd and Market streets, and running eastwardly crosses the Schuylkill opposite Filbert street and thence east longitudinally and over the cartway of that street to a point near 22nd street, where it leaves the street and runs thence along the south line thereof to 15th street at Broad-street station. From the river to the point where it curves and passes to the south side of the street the superstructure over the cartway of the street is supported by a sufficient number of high iron pillars set in the street near the sidewalks thereof, leaving the cartway, as well as the sidewalks, otherwise unobstructed. From the point where it passes to the south side of the street the superstructure rests upon substantial brick walls about 20 feet high and arches spanning the intervening cross-streets. From the river to 22nd street the northerly side of the viaduct is a few feet

south of the north line of Filbert street, and from the curve where it leaves the street to its terminus at the station it runs parallel with and fifty-one feet from the northerly side thereof.

The proof of material and direct damage to plaintiff's property, resulting from the construction of the viaduct, the noise of over 1,400 passing and repassing trains daily, the consequent emission of steam, sparks, cinders, smoke, &c., and vibration to the extent of cracking the walls of the house, was clear and convincing. According to the testimony the effect on the house was such as to greatly impair its value and render it almost uninhabitable; and under a fair and impartial charge, submitting the question of damages to the jury, the verdict was in favor of plaintiff for $4,980, from 30 to 40 per cent. of the estimated value of the property before the road was constructed.

Relying on the recent ruling in Pennsylvania Railroad Co. *v.* Lippincott and others, *supra*, it is now proposed to reverse the
116 judgment and virtually hold, as was done in that case, that, as to this and all similar cases, the constitutional obligation to make just compensation for private property injured in consequence of the exercise of anything delegated to the company for the public benefit is a mere rope of sand, notwithstanding that obligation is virtually written into the only warrant the company has for doing what it has done in the past and what it may rightfully do in the future.

It is thus apparent that the question is one of more than ordinary importance and far-reaching in its consequences. With great deference to the judgment of those who see the matter in a different light, I have therefore ventured to cite some authorities and offer some suggestions bearing on the construction of the section in question and in support of what appears to me the manifest justice and legality of the judgment of the court below.

For some time prior to the ruling in Penna. Railroad Co. *v.* Lippincott *et al.*, *supra*, and especially after the decisions in the Duncan and McCutcheon cases, *supra*, it was confidently believed that every doubt as to the meaning of that section had been dispelled, and that thenceforth the just and equitable provisions of the constitutional obligation to make compensation, not only for property taken, but also for property injured or destroyed by those "invested with the privilege of taking private property for public use," would be enforced in the same spirit of fairness and justice in which they were conceived and afterwards adopted by the people as part of their organic law, and that, too, without stopping a single wheel or relegating anybody to that dreaded "Utopia where the whistle of the locomotive, the hum of the spindle, and the ring of the hammer are never heard;" but that well-grounded belief, warranted, as I think, alike by the language of the constitution and repeated deliverances of this court, was at least sadly shaken by the de-
117 cision referred to.

If time permitted it would not be difficult to show that it is contrary to the spirit, if not the letter, of the constitution, and, in

a very large class of cases, subversive of rights of property guaranteed by that instrument.

Plaintiff in that case and three other property-owners, all on the north side of Filbert street, claiming to be within the protection of the constitution, severally brought suits for damages, resulting, as in the case of the present plaintiff, from the construction and legitimate use of the company's road, and after fair trials, in which the court below followed the previous rulings of this court in cases referred to, they obtained verdicts aggregating over $29,000, which, on writs of error, were set aside, the majority holding, in substance, that inasmuch as "no part of plaintiffs' property nor any right of way or other appurtenance thereunto belonging has been taken or used in the erection or construction of said viaduct" there has not nor could there be any injury to their property resulting from the construction of the viaduct, and as to damages caused by the maintenance and proper use of the road for its intended purposes there could be no recovery, because adjacent property thus injured is not within the protection of the constitution. The sum and substance of that decision is that, notwithstanding plaintiffs below were confessedly injured and damaged to a very large amount by the company's exercise of delegated authority, they were as remediless as they would have been under the old constitution.

Such a narrow construction of the section under consideration was never dreamed of by those who took an active part in moulding it into its present form, as the debates of the convention will show, nor was it so understood by the people who adopted it, nor is it the construction theretofore clearly recognized and adopted by
118 this court in several cases, some of which have been specially noticed.

The crowning vice of the construction is in restricting the words "injured or destroyed" to such injuries as result wholly from construction alone and holding there can be no recovery for injuries resulting from the use of the road for the very purposes for which its construction was authorized by the legislature. If such substantial and permanent structures were designed to be temporary things of beauty on which to feast the eye there might be some reason in this, but who does not know that they are to be maintained perpetually in the prosecution of the business for which the company was incorporated? In the case of actual taking, whereby the company acquires an easement or right of way over the property appropriated, the purpose for which the servitude is thus fastened upon the land, the duration and manner of enjoyment, the injury to remaining land resulting therefrom are all taken into consideration. Why should not this be done also where there is a direct and manifest injury unaccompanied by actual taking? It was so held in the cases of Railroad *v.* Duncan and Railroad *v.* McCutcheon, *supra*, both of which were cases of injury resulting from operation of the respective roads without any taking. It may be asserted without fear of successful contradiction that in principle they are both identical with the present and other Filbert-street cases. How comes it, then, that the judgment for damages to Duncan's prop-

erty on same side of Filbert street was affirmed and the judgments in favor of Lippincott and others for precisely the same kind of damages are reversed? It was only because of a radical and unwarranted departure from the theretofore recognized and correct construction of the section in question, which, as we have seen, was intended to protect private property from
119 virtual confiscation to the extent that it is directly and necessarily damaged for the public benefit and the benefit of the *locum tenens* of the State. This unjust and inequitable result was made possible only by ignoring or rather reversing the cardinal rules of construction applicable to remedial statutes and more particularly to constitutional provisions for protection of person or property. The object of construction was applied to the latter is to give effect to the intent of its framers and the people in adopting it. The words of a constitution, being the language of the people, are to be taken in their popular, natural, and ordinary meaning rather than in a strictly literal or in a technical sense, unless the context or the very nature of the subject indicates otherwise. Cooley, Const. Lim., 55; 1 Story, Const., 400. Speaking of the duty of resolutely upholding provisions intended for security of person or property, Mr. Justice Bradley, in Boyd *v.* United States, 116 U. S., 685, says: "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be, *Obsta principiis.*"

Our own books are full of cases illustrating the wisdom and justice of the rule referred to. In Buckwalter *v.* Bridge Co., 38 Pa., 281, the company's charter provided that if the bridge was located "within half a mile" of Buckwalter's ferry referees should
120 be chosen "to assess the damages which said Buckwalter may sustain by reason of the erection of said bridge." The referees found that the ferry would be depreciated by reason of the erection of said bridge, as proposed, within half a mile of said ferry by diversion of the travel thereupon, and they accordingly assessed the damages at $1,200. The award was excepted to and set aside because "diversion and loss of travel" were not such an injury as is contemplated by the words of the charter; but this court sustained the construction given by the referees to the words "by reason of the erection of said bridge" and reinstated the award, holding that these words comprehended the purpose for which the bridge was erected and the use intended to be made of it, and hence the owner of the ferry was entitled to compensation for the depreciation of his ferry resulting from the diversion of travel from it to the bridge.

If the court had been disposed to stick in the bark and adopt a

narrow, but perhaps a literal, construction of the bridge company's charter it might have impaled the ferryman on a very sharp point by holding that the words of the charter meant damages resulting solely from the erection of the bridge and not from the use of it after it was erected; but such a construction would have been manifestly erroneous and unjust.

Again, in Lycoming Gas & Water Co. *v.* Moyer, 99 Pa., 615, the charter provided that "if in the location of said works an injury shall be done to private property and the parties cannot agree" viewers shall be appointed, &c. The company having located its works with the view of utilizing in part the water of a certain stream, whereby, when the works were put in operation, the flow of water from the stream through a mill-race below was considerably diminished, it was held that the owner of the mill-race, though
121 not injured by the location of the works, strictly considered, was nevertheless within the protection of the obligation of, the company to make compensation for injury to private property done "in the location of" its works, and therefore entitled to damages for the injury he had suffered and would thereafter sustain by the diminution of flow in his race, estimated on the footing of the continuing and permanent use to which part of the water of the stream was intended to be applied. Authorities of like import might be multiplied almost indefinitely showing conclusively that remedial statutes, intended to protect private rights, are never narrowly and literally, but always liberally, construed, so as to effectuate the object intended; but those already cited must suffice. The rule of construction for which I contend is distinctly recognized by our brother Paxson in the very recent case of Chester County *v.* Brower, 20 W. N. C., 431, wherein, referring to same section now under consideration, he says: "The language of the constitution is to be construed liberally, so as to carry out and not defeat the purpose for which it was adopted." If the slightest degree of that liberality had been exercised in this case, the plaintiff below, damaged to the extent of nearly $5,000, as established by the verdict of the jury, could not have been turned out of court without a cent.

In the opinion of the majority in this case the question is suggested "whether in case a natural person were the owner of this road and were operating it in the manner that the defendant company are now doing he would be responsible to plaintiff for damages," and it is promptly answered in the negative, "for the reason * * * that he would have a right to the reasonable use and enjoyment of his property, and if in such use, without negligence or malice, a loss unavoidably falls upon his neighbor, he is not liable in damages therefor." This is a broad and sweeping proposition, and, in view of the established facts of this case,
122 I venture, with great respect and deference, to suggest that it is as unsound as it is broad. If a private person can acquire control of property on one side of a populous street in the heart of a city and so use it for an extraordinary purpose as to permanently damage property on the opposite side of the street to the extent of 30 to 40 per cent. of its market value and not be liable,

the maxim *sic utere tuo ut aliena non laedas* is practically obsolete, and the law of nuisances must be modified accordingly. Pollock on Torts, 330; Wood on Nuisances, 577, 584, 603, 679, 693; Pottstown Gas Co. *v.* Murphy, 56 Pa., 460; Bridge Co. *v.* Guisse *et al.*, 35 N. J. L. R., 558, 564.

Conceding for argument sake that the word injury or "injured," as used in the constitution, means "such a legal wrong as would be the subject of an action for damages at common law," and that "for such injuries both corporations and individuals now stand upon the same plane of responsibility," it is very clear that the facts of this case, as established by the verdict, unquestionably furnish the grounds for such an action; and if it were not for the authority vested in the railroad company by the legislature to do the acts complained of for the public benefit, such action would undoubtedly lie against it. But, as we have seen, the company's warrant to do these acts is coupled with the obligation to make compensation for the injuries resulting therefrom, and hence it should be required to do so.

The *argumentum ab inconvenienti*, that if the Filbert-street property-owners were permitted to recover the door would be thrown wide open to every property-owner at every point of the compass, and "as far as the whistle of the locomotive can be heard or its smoke can be carried," to bring suit for damages, is more imaginary than real, and it may be answered by the fact that the road has been completed and in operation for about seven years and no such suits have ever been heard of, nor is it likely that they ever
123 will be, because under our recent ruling in O'Brien *v.* Railroad Co., *supra*, all such actions are now barred by lapse of time; but if it were otherwise what have such considerations to do with the construction of a clause in the constitution? Surely it is not to be so construed as to exclude meritorious claimants who are within its protection because possibly the number of claimants might happen to be undesirably large. It is well settled, moreover, that there never can be any recovery for remote, uncertain, and speculative damages.

This contention involves other matters worthy of special notice, but want of time precludes their consideration at present. Enough has been said, however, to show that the departure, as I regard it, in Railroad Co. *v.* Lippincott and others was a mistake that ought to be promptly corrected, and I would therefore unhesitatingly affirm this judgment.

PENNSYLVANIA R. R. Co.
vs.
MARCHANT.

STATE OF PENNSYLVANIA,
Eastern District, } *ss:*

I, Charles S. Greene, prothonotary of the supreme court of Pennsylvania, in and for the eastern district, do hereby certify that the above and foregoing is a true copy of the dissenting opinion in the

above-entitled cause so full and entire as appears of record in said court.

In testimony whereof I have hereunto set me hand and
[SEAL.] affixed the seal of said court, at Philadelphia, this 21st day of April, A. D. 1890.

CHAS. S. GREENE,
Prothonotary.

(Endorsed:) 133. Sept. T., 1884. C. P. 3. Penna. Railroad Co., pl't'ff in error, *vs.* Edward D Marchant, def't in error. Certified copy of dissenting opinion by Sterrett, J. Filed Apr. 21, 1890. Jas. W. Fletcher, *pro* proth'y.

124 EASTERN DISTRICT OF PENNSYLVANIA, *sct:*

The Commonwealth of Pennsylvania to the justices of the
[SEAL.] No. 3 court of common pleas for the county of Philadelphia, Greeting:

Whereas by virtue of our writ of error from our supreme court of Pennsylvania for the eastern district, returnable in the said court on the first Monday of January, in the year of our Lord one thousand eight hundred and eighty-eight, a record was brought into the same court of a judgment rendered against Pennsylvania Railroad, plaintiff in error, at the suit of Edward D. Marchant, defendant in error, in a certain plea of which was in your said court by our writ of error, and it was so proceeded in our said supreme court that the said judgment was reversed and the record and proceedings thereupon and all things concerning the same were (agreeably to the directions of the act of assembly in such cases made and provided) ordered by the said supreme court to be remitted to the No. 3 court of common pleas for the county of Philadelphia aforesaid, as well for execution as otherwise as to justice shall appertain; wherefore we hereby remit you the record of the judgment aforesaid and the proceedings thereupon in order for execution or otherwise as aforesaid.

Witness the Honorable Isaac G. Gordon, doctor of laws, chief justice of our said supreme court, at Philadelphia, the 10th day of April, in the year of our Lord one thousand eight hundred and eighty-eight.

CHAS. S. GREENE,
Prothonotary.

(Endorsed:) C. P. 3. 133. Sept., 1884. No. 142. July term, 1887. Supreme court. Pennsylvania Railroad Company, plaintiff in error, *vs.* Edward D. Marchant, defendant in error. Remittitur. Writ of error, 6.00; att'y, 3.00; pro., 7.25; rem., 75; certified copy of opinion, 8.00. Filed Apr. 11, 1888. C. B. Roberts, *pro* proth'y. Wayne MacVeagh.

125 THE PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
vs.
EDWARD D. MARCHANT, Defendant in Error.

To the Honorable Edward M. Paxson, LL. D., chief justice of the supreme court of Pennsylvania:

The petition of Adeline B. Marchant, administratrix of Edward D. Marchant, respectfully showeth—

That the Pennsylvania Railroad Company brought suit in the supreme court of Pennsylvania for the eastern district, entered to July term, 1887, No. 142, by writ of error to a judgment of the court of common pleas No. 3 of Philadelphia county in a suit entered to September term, 1884, No. 133, and wherein one Edward D. Marchant was plaintiff and The Pennsylvania Railroad Company defendant, in which suit in the said supreme court The Pennsylvania Railroad Company was plaintiff in error and the said Edward D. Marchant was defendant in error.

That the said suit in the said court of common pleas No. 3 of Philadelphia county was an action of trespass on the case brought by the said Edward D. Marchant against the Pennsylvania Railroad Company to recover damages alleged to have been sustained by the said Edward D. Marchant through the erection, construction, and operation of a portion of the railroad of the Pennsylvania Railroad Company in the city of Philadelphia popularly known as its elevated railroad on Filbert street by reason of its proximity to the property of the said Edward D. Marchant; which suit was pleaded to issue and tried before a judge and jury in said court of common pleas No. 3, and wherein, on November 8th, 1886, the said Edward D. Marchant recovered a verdict for four thousand nine hundred and eighty dollars against the said Pennsylvania Railroad
126 Company as compensation for the injury done to his property by the construction and operation of the railroad aforesaid, upon which verdict judgment was subsequently entered against the Pennsylvania Railroad Company, to wit, on June 9th, 1887; that subsequently, on the 9th day of April, 1888, the supreme court of Pennsylvania, sitting at Philadelphia, ordered said judgment to be reversed on the ground that the said plaintiff had no right of action, which judgment of reversal was duly entered in the eastern district of Pennsylvania aforesaid, and on the 11th day of April, 1888, a remittatur from said supreme court of Pennsylvania was filed in said court of common pleas No. 3 of Philadelphia county, certifying that said judgment had been reversed. (A certificate of the prothonotary of the supreme court of Pennsylvania is annexed hereto, showing that the above judgment was duly entered, and that the record was duly remitted by the supreme court of Pennsylvania to the court of common pleas No. 3 of Philadelphia county for lodgment there); that since the bringing of said suit Edward D. Marchant has died and letters of administration upon his estate have been duly granted to your petitioner, Adeline B. Marchant; that the said judgment of the said supreme court is a judgment of the highest

court of record of the Commonwealth of Pennsylvania; that the judgment of said court is final; that the said reversal of said judgment was made without the awarding of a *venire de novo;* that the denial by the supreme court of Pennsylvania of the plaintiff's right to compensation for the taking, injuring, and destroying of the property of the said Edward D. Marchant by the Pennsylvania Railroad Company, under the privilege it possesses by grant from the Commonwealth of Pennsylvania of taking private property for public use, deprives your petitioner of her property without due process of law and is a denial to your petitioner of the equal protection of the laws, and these are the Federal questions in-
127 volved in the decision; that the decision and judgment of the supreme court of Pennsylvania aforesaid were in contravention of the established principles of law securing to your petitioner the quiet and peaceable possession, ownership, and enjoyment of her property and were against the clause in article XIV of the Constitution of the United States which provides as follows: "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person in its jurisdiction the equal protection of the laws." (A printed copy of the record of the court below is hereto annexed, showing the facts out of which the Federal questions involved in this case arose.)

Your petitioner therefore prays for the allowance of a writ of error to the court of common pleas No. 3 of Philadelphia county, State of Pennsylvania, where the record lies, in order that the judgment of the said court may be re-examined and reversed or affirmed in the Supreme Court of the United States; and she will ever pray.

(S'g'd) ADELINE B. MARCHANT,
Adm'n'x of Estate of Edward D. Marchant.

STATE OF PENNSYLVANIA, } *ss:*
County of Philadelphia, }

Adeline B. Marchant, being duly sworn, deposes and says that the facts set forth in the foregoing petition are true to the best of her knowledge and belief.

ADELINE B. MARCHANT.

Sworn and subscribed to before me this third day of April, A. D. 1890.

[SEAL.] WM. G. WISE,
Notary Public.

Endorsed: Pennsylvania Railroad Co. *v.* Marchant. Petition for writ of error. The writ of error within prayed for is allowed. Edward M. Paxson, chief justice of supreme court of Pa. Filed Apr. 8, 1890. Samuel Bell, clerk.

128 UNITED STATES OF AMERICA, } *sct:*
Eastern District of Pennsylvania, }

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third cir-

cuit, do hereby certify the foregoing to be a true and faithful copy of the original petition for writ of error, with allocatur of chief justice supreme court of Pennsylvania, in the case of The Pennsylvania Railroad Company, plaintiff in error, *vs.* Edward D. Marchant, defendant in error, on file and now remaining among the records of the said court in my office.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court, at Philadelphia, this 27th day of Sept'r, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fifteenth.

[SEAL.] SAMUEL BELL, *Clerk, &c.*

129 In the Supreme Court of the United States.

ADELINE B. MARCHANT, Administratrix of Edward D. Marchant, Plaintiff in Error,
vs.
THE PENNSYLVANIA RAILROAD, Defendant in Error.

Surwrit of error from the Supreme Court of the United States to the court of common pleas No. 3 of the county of Philadelphia, of No. 133, September term, 1884.

I hereby accept service of the citation in the above case and waive return of the same.

(Signed) M. HAMPTON TODD,
For Plaintiff in Error.

(Signed) WAYNE MACVEAGH,
A. H. W.,
For Defendant in Error.

130 Know all men by these presents that we, Adeline B. Marchant, administratrix of Edward D. Marchant, deceased, and the City Trust, Safe Deposit and Surety Company of Philadelphia, are held and firmly bound unto the Pennsylvania Railroad Co. in the full and just sum of five hundred dollars, to be paid to the Pennsylvania Railroad Co., its certain attorney, successors, or assigns, and which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the third day of April, in the year of our Lord one thousand eight hundred and ninety.

Whereas late-, at a court of common pleas No. 3 of Philadelphia county, State of Pennsylvania, in a suit depending in said court between Edward D. Marchant, plaintiff, and The Pennsylvania Railroad Co., defendant, judgment was rendered against the Pennsylvania Railroad Co., and the said judgment was subsequently reversed by the supreme court of Pennsylvania; and whereas the said Edward D. Marchant has since died and letters of administration on his estate have been duly granted to the said Adeline B. Marchant, and the said Adeline B. Marchant, administratrix aforesaid,

having obtained a writ of error from the Supreme Court of the United States and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Pennsylvania Railroad Co., citing and admonishing it to be and appear at a Supreme Court to be holden at Washington the second Monday of October next:

Now, the condition of this obligation is such that if the said Adeline B. Marchant, administratrix as aforesaid, shall prosecute her writ of error to effect and answer all damages and costs if she
131 fails to make her plea good, then the above obligation to be void; else to be and remain in full force and virtue.

(S'g'd) ADELINE B. MARCHANT, [SEAL.]
Adm'n'x of Estate of Edward D. Marchant.
THE CITY TRUST, SAFE DEPOSIT AND SURETY COMPANY OF PHILADELPHIA.
(S'g'd) CHAS. M. SWAIN, *President.*
[Seal of T. Co.]
Attest: JOHN A. SIMS,
Per —— ——, *Secretary.*

Witness present:
AVERY D. HARRINGTON,
As to A. B. M.

The above bond approved by—
(S'g'd) EDWARD M. PAXSON,
Chief Justice.

Endorsed: 133. Sept. term, 1884. C. P. No. 3. Adeline B. Marchant, administratrix of Edward D. Marchant, *v.* Pennsylvania Railroad Co. Bond surwrit of error. Filed Apr. 5, 1890. C. B. Roberts, *pro* proth'y.

132 EDWARD D. MARCHANT *vs.* THE PENNSYLVANIA RAILROAD COMPANY. } C. P. No. 3, Sept. T., 1884. No. 133.

And now, April 5th, 1890, comes Adeline B. Marchant, by her attorney, M. Hampton Todd, into court and suggests to the court that the said plaintiff, Edward D. Marchant, has died and that letters of administration upon his estate have been granted to the said Adeline B. Marchant, and that the said action doth survive to the said administratrix, and she hereby joins in and becomes the party plaintiff in said action.

M. HAMPTON TODD,
Attorney for Adeline B. Marchant, Administratrix, &c.

The proth'y will please enter of record my appearance in the above cause for Adeline B. Marchant, administratrix of Edward D. Marchant, deceased.

April 5th, 1890.

M. HAMPTON TODD,
Att'y for Administratrix, &c.

To proth'y of com. pl's c't.

(Endorsed:) 133. Sept. T., 1884. C. P. No. 3. Marchant *v.* Penna. R'd Co. Suggestion of death, substitution of administratrix and appearance for her. Filed Apr. 5, 1890. P. H. White, *pro* proth'y. Todd.

133 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the court of common pleas No. 3 for the county of Philadelphia and to the court of common pleas No. 3 for the county of Philadelphia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a plea or action which lately was in the supreme court of Pennsylvania, being the highest court of law and equity of said State, the record and proceedings in which plea or action have been remitted and sent to the said court of common pleas No. 3 for the county of Philadelphia by the said supreme court of Pennsylvania, which record and proceedings now remain with and on file in the office of the prothonotary of the said court of common pleas No. 3 for the county of Philadelphia, in which plea or action The Pennsylvania Railroad Company was plaintiff in error and one Edward D. Marchant was defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, tr-aties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Edward D. Marchant, as by the complaint of Adeline B.

134 Marchant, adm'n'x of estate of Edward D. Marchant appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the third day of April, in the year of our Lord

one thousand eight hundred and ninety, and in the 114th year of the Independence of the said United States.

[Seal U. S. Circuit Court, E. D. Pa.]

SAMUEL BELL,
Clerk Circuit Court of the United States,
Eastern District of Pennsylvania.

(Endorsed:) 133. Sep., 1884. C. P. 3. Supreme Court of the United States. Adeline B. Marchant, administratrix of Edward D. Marchant, dec'd, plaintiff in error, *vs.* Pennsylvania Railroad Company, defendant in error. Writ of error. April 5, 1890, bro't into office. C. B. Roberts, dep. P. M. Hampton Todd, attorney for plaintiff in error.

135 In the Supreme Court of the United States.

ADELINE B. MARCHANT, Administratrix of Edward D. Marchant,
Plaintiff in Error,
vs.
PENNSYLVANIA RAILROAD COMPANY, Defendant in Error.

Assignments of Errors.

And now, to wit, on the second Monday in October, 1890, before the justices of the Supreme Court of the United States, comes Adeline B. Marchant, administratrix of Edward D. Marchant, by M. Hampton Todd, her attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1. The supreme court of Pennsylvania erred in deciding that the plaintiff had no cause of action against the defendant.

2. The supreme court of Pennsylvania erred in deciding that the defendant, under its privilege of taking private property for public use, had the right to deprive the plaintiff of her property without compensation.

3. The supreme court of Pennsylvania erred in deciding that the present cause was different in principal from the case of Pennsylvania Railroad Company *vs.* Duncan, 111 Pa. St. Rep., 352, and 132 U. S. Rep., 75. The effect of said decision is that under the same constitutional guarantees it gives to one person a right to compensation for property damaged by the defendant in the exercise of its power of eminent domain and denies it to another, and as in this instance the decision is against the plaintiff's right to compensation for the injury to her property by the defendant, she is thereby deprived of the equal protection of the laws.

136 4. The supreme court of Pennsylvania erred in deciding that the defendant, under its powers of eminent domain, possessed the right to construct and operate its elevated railroad on ground abutting on the opposite side of Filbert street from plaintiff's property without liability to make compensation to the plaintiff for the damage thereby sustained. The effect of the said decision is that it deprives the plaintiff of her property without due process of law.

5. The supreme court of Pennsylvania erred in reversing the judgment of the court of common pleas No. 3 of Philadelphia county in this cause.

6. The supreme court of Pennsylvania erred in not affirming the judgment of the court of common pleas No. 3 of Philadelphia county in this cause.

7. The supreme court of Pennsylvania erred in reversing the judgment of the court of common pleas No. 3 of Philadelphia county for not affirming the defendant's first point, which was:

"1. The defendant, under its charter and supplements in evidence, had full lawful authority to erect and operate the Filbert-street extension or branch described in the declaration without incurring any liability by reason thereof for consequential damages to the property of the plaintiff, the uncontradicted evidence being that none of the said property was taken by the defendant, but that the entire width of Filbert street intervenes between the railroad of the defendant and the nearest point thereto of the property of the plaintiff."

8. The supreme court of Pennsylvania erred in reversing the judgment of the court of common pleas No. 3 of Philadelphia county for not affirming the defendant's second point, which was:

"2. The defendant, as purchaser of the main line of the
137 public works of this State under the act of assembly and deed in evidence, had full lawful authority to erect and operate the said Filbert-street extension or branch without incurring any liability to the plaintiff for alleged consequential damages to his property, the uncontradicted evidence being that none of the said property was taken by the defendant, but that the entire width of Filbert street intervenes between the railroad of the defendant and the nearest point thereto of the property of the plaintiff."

9. The supreme court of Pennsylvania erred in reversing the judgment of the court of common pleas No. 3 of Philadelphia county for not affirming the defendant's third point, which was:

"3. The contracts contained in the charter of the defendant and the supplements thereto in evidence, as well as the contract contained in the act of assembly and deed for the main line, already mentioned, authorized the defendant to construct said extension or branch with liability for property taken only, and no subsequent legislation by this State can impair the obligations of those contracts or either of them by increasing the price of the exercise of the franchises granted by imposing an obligation to pay for property alleged to be injured, but not alleged to have been taken."

10. The supreme court of Pennsylvania erred in reversing the judgment of the court of common pleas No. 3 of Philadelphia county for not affirming the defendant's fourth point, which was:

"4. The property of the plaintiff being separated from the railroad of the defendant by the entire width of Filbert street, a public highway of the city of Philadelphia of the width of fifty-one feet,
there is no liability on the part of the defendant for alleged
138 consequential damages to said property."

11. The supreme court of Pennsylvania erred in reversing

the judgment of the court of common pleas No. 3 of Philadelphia county for not affirming the defendant's fifth point, which was:

"5. The uncontradicted evidence being that the property of the plaintiff is situated on the north side of Filbert street, a public highway of the city of Philadelphia, on the opposite side from the railroad of the defendant, which does not occupy any part of said street opposite the property of the plaintiff, and is erected wholly on its own property, being a distance of fifty-one feet therefrom, and there being no evidence that any of the property of the plaintiff was taken, injured, or destroyed by the construction of the said Filbert-street extension or branch, the verdict must be for the defendant."

12. The supreme court of Pennsylvania erred in reversing the judgment of the court of common pleas No. 3 of Philadelphia county for not affirming the defendant's sixth point, which was:

"6. The plaintiff's property being situated in a thickly built portion of the city of Philadelphia and upon the opposite side of a frequented public highway, the defendant is not responsible for the consequences to the plaintiff's property of the proper and careful operation of its road."

13. The supreme court of Pennsylvania erred in reversing the judgment of the court of common pleas No. 3 of Philadelphia county for not affirming the defendant's seventh point, which was:

"7. Under all the evidence the verdict should be for the defendant."

139 And the said Adeline B. Marchant, administratrix of Edward D. Marchant, prays that the final judgment of the supreme court of Pennsylvania may be reversed, annulled, and set aside and judgment be entered by the Supreme Court of the United States for the said Adeline B. Marchant, administratrix of Edward D. Marchant, deceased.

M. HAMPTON TODD,
Attorney for Plaintiff in Error.

140 STATE OF PENNSYLVANIA, }
County of Philadelphia, } *ss:*

I, William B. Mann, prothonotary of the court of common pleas for the county of Philadelphia, do hereby certify that the foregoing is a true, perfect, and complete transcript of the record of the proceedings in this court and the supreme court of Pennsylvania in a cause and action wherein Edward D. Marchant was plaintiff and The Pennsylvania Railroad Company was defendant, as referred to in a writ of error from the Supreme Court of the United States to the court of common pleas No. 3 of Philadelphia county and the said writ of error filed in this office on ths 5th day of April, 1890, together with an acceptance of service of the citation on such writ of error, with a certified copy of the petition for writ of error and endorsements thereon entered in the office of the clerk of the circuit court of the United States for the eastern district of Pennsylvania, which certified copy was also filed in this office on the third day of October, 1890, and a true and correct copy of the bond executed on

behalf of the plaintiff in error mentioned in said citation, which bond remains on file in this office and was filed herein on the fifth day of April, 1890, and the assignment of errors and prayer for reversal upon said writ of error filed in this office on the third day of October, 1890.

In testimony whereof I have hereunto set my hand and seal of the said courts of common pleas of Philadelphia this third day of October, A. D. 1890.

[Seal Court of Common Pleas, Philadelphia, Penna.]

WILLIAM B. MANN,
Prothonotary.

Endorsed on cover: Case No. 14,220. Pennsylvania court of common pleas No. 3, Philadelphia county. No. 221. Adeline B. Marchant, administratrix of Edward D. Marchant, deceased, plaintiff in error, *vs.* The Pennsylvania Railroad Company. Filed October 7, 1890.

Office Supreme Court U. S.
FILED.
DEC 11 1893
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

October Term, 1893. No. 221.

Adeline B. Marchant, Administratrix of Edward D. Marchant, deceased, Plaintiff in Error,

vs.

The Pennsylvania Railroad Company, Defendant in Error.

ERROR TO THE COURT OF COMMON PLEAS, NO. 3, FOR THE COUNTY OF PHILADELPHIA, STATE OF PENNSYLVANIA.

MOTION TO DISMISS OR AFFIRM.

And now, December 11th, 1893, comes the defendant in error, and moves the court:—

1. To dismiss the writ of error, because the court is without jurisdiction of the subject-matter.

2. To affirm the judgment, because the question on which the jurisdiction depends is so frivolous as not to need further argument.

A. H. WINTERSTEEN,
WAYNE MACVEAGH,
For Defendant in Error.

To M. Hampton Todd, Esq., Attorney for Plaintiff in Error:

Notice is hereby given that the above motion will be filed on Monday, December 11th, 1893, and will be submitted for the consideration of the court at the hearing on the merits.

A. H. WINTERSTEEN,
WAYNE MACVEAGH,
For Defendant in Error.

I acknowledge service of the above motion and notice this day of December, 1893.

Attorney for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
JAN 18 1894
JAMES H. McKENNEY,
CLERK.

No. 221. October Term, 1893.

IN THE

Supreme Court of the United States.

Adeline B. Marchant, Administratrix of Edward D. Marchant, Deceased, Plaintiff in Error,

vs.

The Pennsylvania Railroad Company, Defendant in Error.

ERROR TO THE COURT OF COMMON PLEAS, No. 3, FOR THE COUNTY OF PHILADELPHIA, STATE OF PENNSYLVANIA.

BRIEF OF PLAINTIFF IN ERROR.

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M. HAMPTON TODD,
For Plaintiff in Error.

Allen, Lane & Scott, Prs., Phila.

SUPREME COURT OF THE UNITED STATES.

Adeline B. Marchant, administratrix of Edward D. Marchant, deceased,

vs.

The Pennsylvania Railroad Company.

October Term, 1893.
No. 221.

STATEMENT OF THE CASE.

The action below was trespass on the case brought by Edward D. Marchant in his lifetime against the Pennsylvania Railroad Company for the recovery of the damages sustained by him in the erection by the defendants in 1881 of its elevated railroad on property abutting on the south side of Filbert Street, in the city of Philadelphia, in front of plaintiff's property, which was situated on the north side of Filbert Street, a public highway fifty-one feet in width. (See map in appendix.) The cause was plead to issue, and tried before Finletter, J., and jury, and resulted in a verdict for the plaintiff for $4980, and judgment having been entered thereon in favor of the plaintiff, the defendant removed the cause to the Supreme Court of Pennsylvania, whereupon the judgment was reversed, the majority of the court holding that the plaintiff had no cause for action.

The plaintiff having died pending the litigation, his administratrix was duly substituted as a party plaintiff, who thereupon obtained a writ of error from this court. The plaintiff contends that by the reversal of said judgment the Supreme Court of Pennsylvania deprived her of her property without due process of law, and denied to her the equal protection of the laws in violation of her rights under section 1 of Article XIV. of the Constitution of the United States.

SPECIFICATIONS OF ERROR.

I. The Supreme Court of Pennsylvania erred in deciding that the plaintiff had no cause of action against the defendant.

II. The Supreme Court of Pennsylvania erred in deciding that the defendant, under its privilege of taking property for public use, had the right to deprive the plaintiff of her property without compensation.

III. The Supreme Court of Pennsylvania erred in deciding that the present case was different in principle from the case of Pennsylvania Railroad Company *vs.* Duncan, 111 Pa. St. Rep., 352, and 132 U. S. Rep., 75. The effect of said decision is that under the same constitutional guarantees it gives to one person a right to compensation for property damaged by the defendant in the exercise of its power of eminent domain and denies it to another, and as in this instance the decision is against the plaintiff's right to compensation for the injury to her property by the defendant, she is thereby deprived of the equal protection of the laws.

IV. The Supreme Court of Pennsylvania erred in deciding that the defendant, under its powers of eminent domain, possessed the right to construct and operate its elevated railroad on ground abutting on the opposite side of Filbert Street from plaintiff's property without liability to make compensation to the plaintiff for the damage thereby sustained. The effect of the said decision is that it deprives the plaintiff of her property without due process of law.

V. The Supreme Court of Pennsylvania erred in reversing the judgment of the Court of Common Pleas, No. 3, of Philadelphia County, in this cause.

VI. The Supreme Court of Pennsylvania erred in not affirming the judgment of the Court of Common Pleas, No. 3, of Philadelphia County, in this cause.

VII. The Supreme Court of Pennsylvania erred in reversing the judgment of the Court of Common Pleas, No. 3, of Philadelphia County, for not affirming the defendant's first point, which was:—

"1. The defendant, under its charter and supplements in "evidence, had full lawful authority to erect and operate the "Filbert Street extension or branch described in the declara- "tion without incurring any liability by reason thereof for "consequential damages to the property of the plaintiff, the "uncontradicted evidence being that none of the said prop- "erty was taken by the defendant, but that the entire width "of Filbert Street intervenes between the railroad of the "defendant and the nearest point thereto of the property of "the plaintiff."

VIII. The Supreme Court of Pennsylvania erred in reversing the judgment of the Court of Common Pleas, No. 3, of Philadelphia County, for not affirming the defendant's second point, which was:—

"2. The defendant, as purchaser of the main line of the "public works of this State, under the Act of Assembly "and deed in evidence, had full lawful authority to erect and "operate the said Filbert Street extension or branch without "incurring any liability to the plaintiff for alleged conse- "quential damages to his property, the uncontradicted evi- "dence being that none of the said property was taken by "the defendant, but that the entire width of Filbert Street "intervenes between the railroad of the defendant and the "nearest point thereto of the property of the plaintiff."

IX. The Supreme Court of Pennsylvania erred in reversing the judgment of the Court of Common Pleas, No. 3, of Philadelphia County for not affirming the defendant's third point, which was:—

"3. The contracts contained in the charter of the defendant, "and the supplements thereto in evidence, as well as the contract "contained in the Act of Assembly and deed for the main line, "already mentioned, authorized the defendant to construct said "extension or branch with liability for property taken only, and "no subsequent legislation by this State can impair the obli- "gations of those contracts, or either of them, by increasing the "price of the exercise of the franchise granted by imposing an

"obligation to pay for property alleged to be injured, but not "alleged to have been taken."

X. The Supreme Court of Pennsylvania erred in reversing the judgment of the Court of Common Pleas, No. 3, of Philadelphia County, for not affirming the defendant's fourth point, which was:—

"4. The property of the plaintiff being separated from the "railroad of the defendant by the entire width of Filbert "Street, a public highway of the city of Philadelphia, of the "width of fifty-one feet, there is no liability on the part "of the defendant for alleged consequential damages to said "property."

XI. The Supreme Court of Pennsylvania erred in reversing the judgment of the Court of Common Pleas, No. 3, of Philadelphia County, for not affirming the defendant's fifth point, which was:—

"5. The uncontradicted evidence being that the property "of the plaintiff is situated on the north side of Filbert Street, "a public highway of the city of Philadelphia, on the opposite "side from the railroad of the defendant, which does not "occupy any part of said street opposite the property of the "plaintiff, and is erected wholly on its own property, being a "distance of fifty-one feet therefrom, and there being no evi-"dence that any of the property of the plaintiff was taken, in-"jured, or destroyed by the construction of the said Filbert "Street extension or branch, the verdict must be for the "defendant."

XII. The Supreme Court of Pennsylvania erred in reversing the judgment of the Court of Common Pleas, No. 3, of Philadelphia County, for not affirming the defendant's sixth point, which was:—

"6. The plaintiff's property being situated in a thickly built "portion of the city of Philadelphia and upon the opposite "side of a frequented public highway, the defendant is not "responsible for the consequences to the plaintiff's property of "the proper and careful operation of its road."

XIII. The Supreme Court of Pennsylvania erred in reversing the judgment of the Court of Common Pleas, No. 3, of

Philadelphia County, for not affirming the defendant's seventh point, which was:—

"7. Under all the evidence the verdict should be for the "defendant."

ARGUMENT.

The jurisdiction of this court is invoked on two grounds.

I. The Supreme Court of Pennsylvania, in reversing the judgment which plaintiff had recovered as compensation for the damage done to his property by the construction of defendant's elevated railroad in front thereof, and holding that he had no cause of action for the recovery of such damages, deprived him of his property without due process of law.

II. The Supreme Court of Pennsylvania denied to the plaintiff the equal protection of the laws by holding that the defendant is liable to make compensation for the damage done to abutting owners on Filbert Street by the occupation of the bed of the street for its railroad, and is not liable to the owners of property abutting on the north side of Filbert Street, including plaintiff, where its railroad is on property abutting on the *south* side of Filbert Street, there being no difference in principle between the two classes of cases.

Irrespective of the rights of property guaranteed to the plaintiff by the Constitution of the United States, the right of the plaintiff to recover damages for the injuries of the character shown in this case is secured by section 8, Article XVI. of the Constitution of Pennsylvania, which went into effect on January 1st, 1874. The language of this section is as follows:—

"Municipal and other corporations and individuals invested "with the privilege of taking private property for public use "shall make just compensation for property taken, injured, or "destroyed by the construction or enlargement of their works, "highways, or improvements, which compensation shall be "paid or secured before such taking, injury, or destruction. "The General Assembly is hereby prohibited from depriving "any person of an appeal from any preliminary assessment of

"damages against any such corporations or individuals made "by viewers or otherwise, and the amount of such damages in "all cases of appeal shall, on the demand of either party, be "determined by a jury according to the course of the common "law."

In the eighth article of the Declaration of Rights in the Constitution of 1776 it is declared:—

"But no part of a man's property can be justly taken from "him or applied to public uses without his own consent or "that of his legal representatives."

In section 10 of article IX. of the Constitution of 1790 it is declared:—

"Nor shall any man's property be taken or applied to public "use without the consent of his representatives, and without "just compensation being made."

Section 11 of the same article is:—

"That all courts shall be open, and every man, for an injury "done him in his lands, goods, person, or reputation, shall have "remedy by the due course of law, and right and justice ad- "ministered without sale, denial, or delay. Suits may be "brought against the Commonwealth in such manner, in such "courts, and in such cases as the legislature may by law direct."

The Constitution of 1838, in addition to the foregoing clauses, contained also in section 4 of Article VII. the following new provision:—

"The legislature shall not invest any corporate body or in- "dividual with the privilege of taking private property for "public use without requiring such corporation or individual "to make compensation to the owners of said property, or give "adequate security therefor before such property shall be "taken."

Under the foregoing constitutional provisions the Supreme Court of Pennsylvania have uniformly held that the word "taken" was to be interpreted literally, that is, that it only extended to an actual seizure of property, and that when the injury extended only to "a depreciation of property by de- "creasing the enjoyment of it," the Constitution afforded no protection. The first case perhaps is that of the Phila. & Trenton R. R. Co., 6 Wharton, 25, which has been followed by a series of cases, the last one being that of Struthers *vs.* Dunkirk, &c., Ry. Co., 87 Penn. St. Rep., 282.

This doctrine has been frequently attacked as contrary to reason and justice; the view contended for being that property was "taken" when it was rendered less valuable; but notwithstanding these attacks and the misgivings of the court itself the construction has been steadily adhered to.

In O'Connor *vs.* Pittsburgh, 18 Penn. St. Rep., 189, the court held, notwithstanding a jury had found that by reason of a change in the grade of Grant Street and Fifth Avenue the property of the Roman Catholic congregation was seriously damaged, under the language of the Constitution the congregation was remediless. Chief Justice Gibson, delivering the unanimous opinion of the court, says:—

"We have had this case reargued in order to discover, if "possible, some way to relieve the plaintiff consistently with "law, but I grieve to say we have discovered none. * * * "The constitutional provision for the case of private property "taken for public use extends not to the case of property *in-* "*jured or destroyed*, but it follows not that the omission may "not be supplied by ordinary legislation. No property was "taken in this instance; but the cutting down of the street "consequent on the reduction of its grade left the building use- "less, and the ground on which it stood worth no more than "the expense of sinking the surface of it to the common "level. The loss to the congregation is a total one, while the "gain to the holders of the property in the neighborhood is im- "mense. The legislature that incorporated the city never "dreamt that it was laying the foundation of such injustice."

Again, in Monongahela Nav. Co. *vs.* Coon, 6 W. & S., 114, which arose out of the damage done to Coon's mill, situate on a tributary of the Monongahela River, by the construction of a dam on that river, which backed the water on to the mill-wheel, the court say:—

"Now it cannot be said that the plaintiff's mill was taken or "applied in any legitimate sense by the State or by the com- "pany invested with its power; nor can it be said that he was "deprived of it."

Therefore unless the State or its agent clothed with its power had "taken," in the sense of physical seizure, some portion of the property there could be no recovery. It mattered not how small a portion was actually seized, because the owner could then, under the rule requiring a comparison of the advantages

and disadvantages (Pittsburg, etc., Ry. Co. *vs.* McClosky, 110 Penna. St. Rep., 436), recover compensation not only for the land taken but also for the damages done to his remaining land; but his less fortunate neighbor whose property, possibly by reason of its character and situation, was damaged to a greater extent, could recover nothing, because nothing was actually seized or taken in the sense of seizure. Damages where no property was taken were held to be consequential, and were not recoverable unless the charter of the particular company imposed liability therefor.

To remedy this evil, to suppress this mischief, the clause of the Constitution under consideration was adopted, the words "injured or destroyed" being added to cover the cases of consequential damage not included and relieved against by the word "taken," as construed by the court.

While what passed in debate in the Constitutional Convention can in no legal sense be binding upon the court, yet, in endeavoring to ascertain the old law, the mischief, and the remedy, what was said by eminent lawyers in that body is entitled to some consideration.

Mr. Meredith said (Constitutional Debates, vol. 3, page 597):—

"There is no reason why a man in the neighborhood of a "public work, injured by the construction of it, should not re- "cover damages just as much if his property is not taken as if "it is: For instance, the corner of a man's farm is taken, he "comes for damages. What is the injury done to him by them "in the taking of his property? It is the value of the part of the "farm taken, but the value of the whole has been injured; that "is, his property in the vicinity of the work has been injured. "He recovers damages for that, yet if it so happens that they "must go just an inch outside of the corner of his farm and he "may be equally injured, he cannot under this blind clause, as "I may call it, in our present Constitution, recover a dollar of "damages."

"Let us try to regulate that and *restore* it to the *reason* and "*experience* and *protection* of the *common law* by providing "that when these works are made the property injured by "them, whether part of that property is taken or not, shall be "entitled to recover damages; that is, if the value of the prop- "erty in the neighborhood is depreciated, its owner shall re-

"cover the difference between what the property would have "sold for before the work and what it would sell for after- "wards."

Mr. Alricks said (page 599) :—

"But at common law all natural persons are responsible for "consequential damages."

"Now, I understand that corporations ought to be made "responsible the same as individuals, the same as natural per- "sons; and to do that we must have the provisions stated in "the language we have heard from the gentleman from Phila- "delphia; that is, that the owners of the property over which "a public improvement does not pass, if they are damnified, "shall be entitled to recover their damages."

"It is true they will be consequential damages, and the "court will grant them as consequential damages, but it will "be only on the ground that their property, although it is not "touched by the public improvement, is so convenient to that "improvement that it has been materially damaged."

Mr. White said (page 599) :—

"The only difficulty that is not provided for by law at pres- "ent is the damage likely to result to an individual by reason "of the construction of a road close to his property and injur- "ing its value."

Mr. Biddle said (page 589) :—

"When a railroad runs through a man's property close to "his barn or house, you take into view the disadvantages "caused by the close proximity of the road, the danger of fire, "the annoyance from sparks and smoke, &c., but if the road "was not to run through the man's property but near it, no "matter what the injury to his property, he would get just "nothing."

The rule as to the measure of damages here referred to is the familiar one adopted in Schuylkill Navigation Company *vs.* Thoburn, 7 S. & R., 411, and which has since been continuously followed, namely: The difference between what the property would have sold for before the construction of the road and what it would have sold for after the road was completed, taking into consideration the risk of fire necessarily incident to the proper and legitimate use of locomotives and all such matters as, owing to the peculiar location of the roadway, affect the convenient use and future enjoyment of the property and excluding everything of a speculative nature.

By the Constitution of 1790 the State guaranteed to every citizen that his property should not be taken or applied to public use without just compensation being made therefor. We have seen that this taking was construed in a narrow and literal sense which operated unjustly. The necessities of our advanced civilization, particularly in the growth of our transportation companies, early demonstrated that granting compensation for property *taken* was not sufficient to protect the citizen in the enjoyment of his property. It was soon apparent that these large carrying corporations, growing year by year, whose chief object or purpose was to earn money for their stockholders, would exercise their powers of eminent domain without regard to private right. This the State, acting in its own interest, which was the common weal of all, never did. It therefore became necessary to add to the word "taken," as construed by the court, the words "injured or "destroyed," so as to place the delegates of the State's power on the same footing with all other citizens, and thus render them liable for their acts in the same manner and to the same extent as a natural person.

The Supreme Court of Pennsylvania, in a number of cases arising since the adoption of the present Constitution, have uniformly held that the words "injured or destroyed" included damages, consequential, that prior to the adopting of that instrument could not have been recovered.

In *Pusey* vs. *City of Allegheny, 98 Pa. St. Rep., 522*, Judge Gordon (page 526) says:—

"Under the eighth section of the sixteenth article of the "Constitution of this Commonwealth, municipal as well as "other corporations in whom are vested the right of eminent "domain are required to make just compensation for property "taken, injured, or destroyed by the construction or enlarge-"ment of their works, highways, or improvements. This is "an advance upon the limitations of the right of eminent do-"main as found in the bill of rights, both of the present Con-"stitution and that of 1838. Corporations in whom the leg-"islature has vested this right are by this section made liable "for damages resulting to private property from the construc-"tion, use, or alteration of their works, ways, or improvements. "In other words, to such damages *as are ordinarily called con-*

"*sequential.* This being now the supreme law of the land, it "must govern the case under consideration, and it is idle to "recur to decisions and legislation the authority of which as "to all present or future cases is by this provision annulled."

This ruling has been followed by the Supreme Court of Pennsylvania down to the present time, as can be seen from an inspection of the following cases, subject, however, to an attempted distinction to be discussed hereinafter :—

City of Reading vs. *Althouse*, 93 Pa. St. Rep., 400 ;
New Brighton vs. *The Church*, 96 Pa. St. Rep., 331 ;
Penna. R. R. Co. vs. *Duncan*, 111 Pa. St. Rep., 352.

Judge Sterrett, in the dissenting opinion filed in this cause (printed record, pages 63, 68, and 119 Pa. St. Rep., 541, 569), says :—

"Other cases of the same class might be cited, in which the "same construction is recognized and adopted, viz., that com- "pensation is to be made for injuries resulting from the use or "operation as well as from the construction or enlargement of "public improvements, but it is unnecessary. That construc- "tion had become so generally understood and acquiesced in "that in Penna. R. Co. *vs.* Duncan, *supra*, a case grounded "solely on injury resulting partly from construction, but chiefly "from legitimate operation of the railroad, counsel did not "think worth while to insist on the position that the Constitu- "tion makes no provision for injuries resulting from operation, "but only from construction of the road strictly considered. "The property in that case, shown to have been injured to the "extent of $20,000, almost exclusively by the operation of the "road, is also situated on the north side of Filbert Street, near "the company's viaduct, but, like the plaintiffs in this case, no "part of it was taken, or even touched, by the railroad. The "case was confessedly one in which plaintiff would have been "utterly remediless except for the word 'injured' in the sec- "tion under consideration.

"Pittsb. Junction Railroad Co. *vs.* McCutcheon, 18 W. N., "527 (18 Weekly Notes of Cases, Pa.), was also a case involv- "ing simply the question of injury, without any taking what- "ever. The plaintiff below was tenant for a term of years of "the property injured by the construction and legitimate "operation of the company's elevated road in the city of "Pittsburgh. Under the old Constitution he would have been "absolutely remediless. The action as amended and tried was

"case grounded solely on the word 'injured.' There was a "verdict in his favor for $1116; and on writ of error to this "court the judgment was affirmed in a *per curiam* by the present "Chief Justice, in which it is said, *inter alia*: '*Under the* "'*new Constitution the plaintiff was entitled to compensation* "'*for all the damages, direct and consequential, which he suffered* "'*or might suffer in consequence of the building and operation of* "'*defendant's road.*' The word operation was not inadvert- "ently used in that case. The plaintiff's claim for damages, "like the claim in Railroad *vs.* Duncan, *supra*, depended "almost entirely on the question whether the company was "liable for injuries resulting from the use or operation of its "road. All rulings of the court, so far as they were ex- "cepted to and assigned for error, were affirmed. One of "them was the refusal of the court to charge as requested, "'that no damage can be recovered in this action for injuries "'resulting from the operation of the road after its construc- "'tion.' Another was the refusal to charge 'that damages "'arising from noise, smoke, and dirt in the passage and re- "'passage of trains upon the road are not to be taken into con- "'sideration in estimating plaintiff's damages in this case.' "Another was in charging that 'the ordinary danger from "'accidental fires to the buildings, not resulting from negli- "'gence, and generally all such matters as, owing to the pe- "'culiar location of the road, may affect the convenient and "'future enjoyment of the property, are proper subjects for con- "'sideration.' These and other rulings to the same effect, and "in full accord with previous deliverances of this court, were "affirmed without dissent. They are quoted at some length, "because the elements of damages and the principles involved "are, in my judgment, identically the same as in the present "case, and the cases of Penn. R. Co. *vs.* Lippincott and others, "*supra.*"

In *Penn. Sch. V. R. Co.* vs. *Walsh*, 124 Pa. St. Rep., 544, Chief Justice Paxson, page 559, says:—

"Where the question is the obstruction of access to a prop- "erty by the building of a railroad it is impossible to separate "the construction from the operation of the road. Such a "doctrine would be a misapplication of the rule laid down in "Railroad Co. *vs.* Marchant, *supra.* It would be an unsavory "technicality to hold that a railroad laid down by the curb in "front of a man's door, with trains constantly passing and re- "passing, did not interfere with his access to his house and was "not an injury caused by the construction of the road. No

"authority for such a proposition can be found in anything "this court has ever said. We are of opinion that in the case "in hand there was an injury arising from the erection and "construction. This being so it stands upon the same footing "as to consequential injuries as if it had been an actual taking "of a portion of the plaintiff's property."

The Supreme Court of Pennsylvania, however, have endeavored to draw a distinction between the class of cases where the property injured abuts on a highway appropriated by a railroad company for railway purposes, and where the railroad is not on the bed of the street on which the property fronts, but runs along the street on property abutting on the opposite side of the street.

We shall endeavor to show that this alleged distinction is founded on no known principle of the law that it is purely arbitrary, and is in utter disregard of the established rules of law. For the proper understanding of this question it is necessary that it should be considered in connection with the cases of *Penna. R. R. Co.* vs. *Lippincott* and others, 116 Pa. St. Rep., 472, which were first decided, and the opinion of the majority of the court in this cause is supplementary to the opinion of the majority in those cases. The opinion of the Lippincott case will be found in the appendix. The syllabus of the Lippincott case is "a railroad company constructed a viaduct "or elevated roadway upon property owned by it in fee, "lying on one side of a street, and operated its steam railway "thereon. From the noise, smoke, and dust caused by the "engines and cars, the necessary consequence of the operation "of the railroad, injuries resulted to the plaintiff's property on "the opposite side of the street, no portion of which property "was taken or used in the construction of said viaduct. In an "action on the case for such injuries, the court below instructed "the jury that the plaintiff could recover, and that the measure "of damages would be the difference between the market "values before and after such construction. *Held*, (1) that "such instruction was error; (2) that except on proof of neg-"ligence, the lawful use by a railroad company of a lawful "erection entirely upon its own property is not the subject of "damage even under section 8, Article XVI., of the Consti-"tution."

The view of the court can be best stated in its own language (page 481) :—

"It is not alleged that any injury has resulted from the "erection of this elevated roadway, nor, indeed, could it truth- "fully be so alleged; for the erection is on the defendant's "own ground on the south side of the said street, which street "is some fifty-one feet wide, *so that no part of the plaintiff's "property or any right of way or other appurtenance thereunto "belonging has been taken or used in the erection or construction "of said viaduct.* The damage complained of results wholly "from the manner in which the roadway is used; results from "the noise, smoke, and dust arising from the use of the "engines and cars, the necessary consequence of the use of "the property as a steam railway. As the allegations thus "made *were in whole or in part supported by evidence*, the "learned judge instructed the jury that the measure of dam- "age would be the difference between the market value of the "several properties before the building of the viaduct and the "same value after the structure was completed. *In other "words, the same rule was applied to the cases in hand as that "which applies in the case of an appropriation or taking under "the right of eminent domain*, excepting, of course, that as no "property of any kind was taken, that element of damage was "not considered. * * *

"That there was error in the instruction above stated is to "us very clear. This structure having been erected on the "defendant's own land, *and no property or right of the plaint- "iffs having been seized, appropriated, or interfered with*, we "cannot understand how a rule which applies only to a taking, "and never did apply to anything else, can be adapted to "a case where there had been no such taking. It is not pre- "tended that the erection itself did the plaintiffs any harm, "but its use only; that is, the running of locomotives on it. "*We agree, indeed, that if the ordinary and proper use of the "railway is to be regarded as an element of damage as to a "certain extent, it is in the case of a condemnation.* THE RULE "STATED IS THE CORRECT ONE; but as this rule is not one of "common law but statute it cannot apply to the case now "being considered: Railroad Company *vs.* Yeiser, 8 Penn. St., "366. Unless, therefore, the case can be brought within some "statute, the rule by which damages are measured by advan- "tages and disadvantages ought not to have been adopted; "for, as was said in the case cited per Mr. Justice Rogers, 'it "'is a principle well settled by many adjudicated cases, that "'an action does not lie for a reasonable use of one's right

"'though it be to the injury of another. For the lawful use "'of his own property, a party is not answerable in damages "'unless on proof of negligence.' How then we ask can a "lawful erection by the Pennsylvania Railroad Company, "on its own ground, be the subject of damage to the ad- "joining land-owners? * * * It seems to be very clear "that a private person could do with impunity on his own "property just what the railroad company has done."

Again, page 483:—

"We agree, that over and beyond the damages which arise "from a taking of property, whether in the shape of land or a "right, the Constitution does impose on corporations a direct "responsibility for every injury for which a natural person "would be liable at common law; so we have held in the case "of Edmundson *vs.* The Railroad Company, 111 Penn. St., 316, "and to this doctrine we adhere, for such we think is the spirit "of that instrument, but beyond this we cannot go. *Nor is* "*there any reason why we should depart from a rule so reason-* "*able and subject artificial persons to a burden which cannot be* "*imposed upon natural persons.*"

Again, page 485:—

"If this Pennsylvania Company has been guilty of a "nuisance; if in the use of its road it makes more smoke or "dust than is lawfully allowable in the working of its machin- "ery, and the plaintiffs are thereby injured, they have their "remedy, but not for anything short of this."

After the foregoing ruling in the Lippincott case the defendant took the Marchant case up and it was argued the following year, but it was practically a reargument of the Lippincott case, and the views of the court therein expressed are affirmed and repeated.

Mr. Justice Paxson said, page 56 (the citations are from the printed record):—

"This case is admittedly upon all fours with Pennsylvania "Railroad Company *vs.* Lipqincott, argued and decided at the "last term of the court in the Eastern District, 116 Pa., 142. "If that decision is to stand the present case will have to be "reversed, as they are in direct conflict. * * * We adhere "to the ruling in Railroad Company *vs.* Lippincott, as announced "by our brother Gordon. The ground was so fully covered

"by his opinion that this judgment might well be reversed "without a further discussion of the principles involved. I "concur fully in the views already expressed, and can hardly "hope to throw additional light upon the matter or to strengthen "the argument already made.

"The plaintiff below is the owner of property on the north "side of Filbert Street and brought his action to recover dam- "ages for an alleged injury to said property caused by the "operation of defendant's elevated railroad. The latter is "constructed upon land owned by the company, and the entire "width of Filbert Street intervenes between the railroad and "plaintiff's house. He complains of the noise, the dust, smoke, "and cinders, and the constant jar caused by the passing "trains. He says these causes combined interfere with the "enjoyment of his property, and lessens its market value. "For the purposes of this cause we must consider his allega- "tions established by the verdict of the jury."

Page 57 :—

"It was held in Railroad Company *vs.* Lippincott that the "effect of this clause of the Constitution (section 8, article "XVI.) was to place corporations upon the same plane with "individuals as regards liability for injuries to property, and "that it only made a corporation liable where an individual "was liable at common law."

Page 60, at foot of page :—

"It remains to say that if the construction of the Constitu- "tion contended for be correct, then we have a liability im- "posed upon corporations in the operation of their works, "which is not now and never has been imposed upon individu- "als. No principle of the law is better settled than that a "man has the right to the lawful use and enjoyment of his own "property, and that if in the enjoyment of such right without "negligence or malice an inconvenience or loss occurs to his "neighbor it is *damnum absque injuria*. This must be so or "every man would be at the mercy of his neighbor in the use "and enjoyment of his own."

Page 61 :—

"*This brings us to the question, whether in case a natural per- "son were the owner of this road and were operating it in the "manner that the defendant company are doing he would be re- "sponsible to the plaintiff in damages.* WE ANSWER THIS QUES-

"TION IN THE NEGATIVE. *He would not be responsible for the "reason above given, viz., that he would have a right to the rea- "sonable use and enjoyment of his property, and if in such case "without negligence or malice a loss unavoidably falls upon his "neighbor, he is not liable in damages therefor.*"

Page 62:—

"We understand the word 'injury' (or injured) as used in "the Constitution to mean such legal wrong as would be the "subject of an action for damages at common law. For such "injuries both corporations and individuals now stand upon the "same plane of responsibility."

Page 63:—

"Hence when they extended the protection of the Constitu- "tion to persons whose property should be injured or de- "stroyed by corporations in the construction or enlargement of "the works, we must presume they meant just what they said: "That they intended to give a remedy merely for legal "wrongs and not for such injuries as were *damnum absque "injuria*. Among the latter class of injuries are those which "result from the use and enjoyment of a man's property in a "lawful manner without negligence and without malice. Such "injuries have never before been actionable since the founda- "tion of the world. Judgment reversed."

The above cases have since been followed and extended, if it can be called an extension to return to the rule which obtained before the adoption of the Constitution, because, according to one of the last deliverances on the subject, the property entitled to damages by reason of the exercise of the right of eminent domain must be either that which is actually invaded or that which abuts upon a highway that is invaded.

Penna. Co., &c., *vs.* Penna., &c., R. Co., 151 Pa. St. Rep., 334.

In Jones *vs.* Erie & W. V. Rd., 151 Pa. St. Rep. 30, 47, the court say:—

"The business authorized by the charter of a railroad cor- "poration is the carriage of persons and goods. The work of "construction is provided for as an indispensable preliminary. "A road must be built before it can be operated. The man- "ner and purpose of the construction are to be considered in

"determining questions relating to damages; but in the opera-
"tion of its road a company is liable only for negligence or
"malice. Smoke, dust, and noise are the usual, and in the
"present state of knowledge on the subject, the necessary con-
"sequences of the use of steam and the movement of trains
"just as noise and dust are the consequences of the movement
"of drays and carts over an ordinary highway. The resulting
"inconvenience and discomfort are in both cases *damnum*
"*absque injuria*. Lippincott *vs.* Pennsylvania Railroad, 116
"Pa., 472; Marchant *vs.* the Railroad Co., 119 Pa., 541."

The ruling of the case in hand by the Supreme Court of Pennsylvania and those which preceded it and those which have since followed it seemed to have been put on the following grounds:—

(*A.*) That one constructing and operating a railroad upon his own land, without regard to where the land is situate or how it affects property in the immediate vicinity, is not responsible for the damage done to adjacent property by the ordinary and usual methods of operation, even though such property be specially damaged thereby.

(*B.*) That the eighth section of the sixteenth article of the Constitution providing for just compensation to be made by municipal and other corporations and individuals invested with the privilege of taking private property for public use, for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, is not applicable unless some property be taken or right of way or other appurtenance thereunto belonging has been taken or used in such erection or construction.

(*C.*) That the damage done to property by a corporation authorized by law to prosecute a business is *damnum absque injuria* where the business is conducted in an ordinary and proper way, and, therefore, where a railroad is operated in the usual manner it is not a nuisance, without regard to the question of its location or the special damage done.

(*D.*) That an individual would not have been liable in damages at the common law for inflicting injuries of the character sustained by the plaintiff, therefore a corporation is not.

A.

The question of liability to the plaintiff is not dependent, we think, on the methods by which the railroad company defendant acquired title to its property. It may acquire it in fee, simply by buying it, or it may acquire a right to use it in perpetuity by proceedings in condemnation, which, after all, is nothing more than an involuntary purchase. The Constitution does not make the method of acquisition *the test* to ascertain who is liable for property "taken, injured, or destroyed." Who are to be liable for such damages is fixed by the phrase, "Municipal and other corporations and individuals invested "with the privilege of taking private property for public use "shall make just compensation," &c. This language is not a limitation on the exercise of this branch of the power of eminent domain. It is the description of a class of citizens, and that class, too, the only one in the State that by reason of the possession of the Commonwealth's immunity from liability for its acts that needed to be guarded against.

This clause was directed against every individual or corporation possessing the power of the Commonwealth to take private property for public use. Every other individual or corporation was liable to make just compensation for the property of another "injured or destroyed by his or its acts."

The words "injured or destroyed" were added for the purpose of depriving the delegates of the State's power of eminent domain from pleading the State's immunity from liability as a protection from making just compensation to parties injured and damnified by their acts. It matters not, therefore, whether the defendant bought its property or acquired it by condemnation. What is more to the point is the use to which the property after it is acquired is put. It is the acquisition of land for the purpose of building and operating a railroad upon it and thereby injuring the land in the vicinity that the phrase "injured or destroyed" was added as a limitation on the power of eminent domain. The law already sufficiently protected the citizen against the "*taking*" of his property. The injury that was not protected against arose from damages incident to

the intended *use* of the property acquired for the public purposes by the corporation. It is the use of its property for the purposes of a railroad along the south side of Filbert Street that we seek to hold the defendant responsible for, and for which we think the Constitution intended it should be liable.

B.

The court below, in holding that because no part of the plaintiff's property, or any right of way or other appurtenance thereunto belonging, was *taken* or *used* by the defendant, he had no cause of action for the injury to his property, and thereby has overridden the plain mandate of the Constitution and made a direct return to the doctrine of "taking" as it obtained before the Constitution was adopted. While it is true that none of the cases held that interference with the right of way of an abutting owner over a public street or highway was a "taking," the court now seem to be of opinion that such an interference is a "taking," and the ruling is to again limit the right of action by the test of showing that some property has been "taken," not "injured or destroyed," as the Constitution says, but "taken," as construed by the court in a narrow and literal sense before the adoption of the Constitution. And instead of putting the delegates of the State's power of eminent domain on an equal footing before the law with all other citizens, which was the undoubted object of the Constitution, they are not to be held liable for property "injured or destroyed" by their acts, but only are to be liable where "a right of way "or other appurtenance of property" has been *taken* or *used* in the construction of their works.

Is such a construction of the Constitution a suppression of the mischief and an advancement of the remedy?

C and D.

We think the views of the lower court that injuries of the character sustained by plaintiff in this cause is *damnum absque injuria*, and that a private person could do with impunity on his own property just what the railroad company has done, is

erroneous and contrary to the established principles of the law and disregards the prior decisions of that court.

WE ASK FOR NO OTHER OR GREATER LIABILITY TO BE IMPOSED UPON THIS RAILROAD COMPANY DEFENDANT THAN WOULD BE IMPOSED UPON AN INDIVIDUAL IN LIKE CIRCUMSTANCES EXCEPT TO THE EXTENT THAT THE SAME MUST BE MODIFIED BY THE RULES OF LAW GOVERNING THE EXERCISE OF THE POWER OF EMINENT DOMAIN.

Our position is that a private individual who would maintain and operate on his own property in a thickly built up part of a large city a railroad upon which he would run locomotives and trains of cars at high speed and to the number of fourteen hundred and forty in each twenty-four hours, one every minute, with the accompanying noise, soot, smoke, cinders, vibration, disturbance of sleep, and all the other annoyances incident to the use and operation of a railroad, would be liable not only to indictment for maintaining a nuisance, but also for all special damage that an individual could show he had sustained in his person or estate. And the right of action would be the same whether the property injured adjoined and abutted on the railroad or a highway intervened. The amount of the recovery would be regulated by the amount of damage sustained under proper instructions from the court as to the measure thereof, and would in each case be a question of fact for the jury.

It is because the Pennsylvania Railroad Company possesses the Commonwealth's immunity from liability for maintaining a nuisance that it cannot be indicted for operating its railroad. It is the grant from the legislature of the right to construct, maintain, and operate a railroad, and the obligation to perform the public duties incident thereto, that invests it with the privilege and immunity that a private individual on his own property does not possess. It is because the Commonwealth has delegated to it for public purposes a portion of its sovereignty that it is not liable for acts lawfully done in the performance of such purpose. Inasmuch as the Commonwealth is not liable neither is its agent.

The defendant cannot be restrained from exercising the privilege of maintaining and operating a railroad in accordance with the provisions of its charter even though it maintained a nuisance and negligently operated the same.

In Pottstown Gas Co. *vs.* Murphy, 39 Pa. St. Rep., 257, which was an action for maintaining a nuisance, it was held that:—

"A corporation is exempt from consequential damages only "when being clothed with the State's right of eminent domain "it takes private property for public use on making proper "compensation."

Lowrie, J. (page 265), says:—

"But the defendants think that a corporation authorized by "statute to carry on their business, and to purchase in fee "such real estate as may be necessary to it, they are not an- "swerable for consequential damages. We cannot adopt this "view. No such exemption is involved in the fact of incor- "poration nor in the privilege of buying land. *The principle "they invoke only applies when a corporation is clothed with "the right of eminent domain.*"

In Pittsburgh, F. W. & C. Ry. Co. *vs.* Gilliland, 56 Pa. St. Rep., 445, which was an action to recover damages for the improper construction of a culvert for carrying under the railroad a small stream of water in that it was too small for the purpose, and thereby flooded plaintiff's property, the court, Agnew, J., says (page 451): "If one should build a road from "his house to his barn over a rivulet just below his neighbor's "land, he would clearly be liable for the injury arising from "an insufficient culvert which backed up the water when ordi- "narily high, and by its overflow destroyed his neighbor's gar- "den, filled his cellar with water, and cracked the walls of his "house. The only difference between a railroad company and "an individual in such a case is that the former is not liable "for the necessary consequences of the location and proper "construction of its road, except so far as it is made liable by "its charter. * * * The company exercises a part of the "public right, but the State, as *parens patriæ* is always care- "ful of her children, doing no unnecessary hurt, and in delegat- "ing this power to a private company of men she does not in- "tend that they shall be less careful of the interests of her

"people than herself. These principles would apply to a "company standing upon its own ground, and certainly their "force is not lessened when the entry is upon the land of "another and the right of eminent domain exercised there."

In *Western Penna. Rd. Co.* vs. *Hill*, 56 Pa. St., 460, which was an appeal from proceedings in condemnation, the principal element of damage being the loss of custom to a mill by reason of the danger to be apprehended to horses, &c., and inconvenience and delay of persons going to and from the mill, Thompson, C. J., page 465, says: "When the deterioration "results from actual and not speculative causes, and, to all "human appearance, from causes which promise to continue, "then it must be admitted as a ground of damage."

"At common law depreciation of property by agencies that "would destroy its value would undoubtedly be a ground for "the recovery of damages. The maxim *sic utere tuo ut "alienum non ledas* embodies the duty, and the law must "enforce it or the maxim would be idle. In 3 Casey, 99, re- "peated in 1 Wright, 469, and other cases, it was held 'that "'the construction which has been given to legislative charters "'for improvement companies generally has been *that they are "'intended to secure compensation for such injuries as the com- "'mon law recognizes as fit objects for compensation.*' * * * "The direct and immediate result of the construction of a "road over land taken, if injurious, gives title to damages, "even to the extent of estimated inconveniences."

In Columbia Bridge Company *vs.* Guisse, 35 New Jersey L. R., 562, Beasley, C. J., says: "The true test of liability is "whether the plaintiffs could have put up their structure with- "out such legislative sanction. If the plaintiffs had erected "the bridge without legislative authority, it would have "been a *public nuisance*, and as it would have worked special "damage to the defendants an action would have lain in their "behalf founded on such wrong."

In Brand *vs.* Hammersmith R. R., L. R., 2 Q. B., 223, Montague Smith, J., page 239, says: "The company are vol- "unteers in embarking in the business and in using the land "adjoining the plaintiff's house; and I am unable to find "any principle or authority for holding that a person or com- "pany building a railway and employing engines and carriages

"upon it are by the common law entitled to greater immunity "when causing damage to others than the practisers of other "useful and longer-established trades. *I therefore come to the "conclusion that without the protection of the statutes the company "would have been subject to an action at the suit of the plaintiff.*"

In Hammersmith R. R. *vs.* Brand, 4 L. R., Eng. and Ir. Appeal Cases, 171, it is said :—

"I think it is agreed on all hands that if a person not au- "thorized by Act of Parliament so to do erected a railway "or other private road on his lands, and then worked it by "running locomotives and trains, or any other species of car- "riages upon it so that the vibration and noise were to such an "extent as really to be annoying to a neighbor, that injury "would be a nuisance, and that neighbor would have a fresh "cause of action against the maintainer of the wrong every "time that the way was so worked as to give rise to the nui- "sance."

Again, on page 185, Lush, J., says : "It is clear that if with- "out the sanction of Parliament a private individual had "caused the damage by making a railroad upon his own land "and running trains upon it he would have been liable to ac- "tion from time to time as long as the nuisance continued at "the suit of the party injured."

Pollock on Torts, 350, defining various kinds of nuisances, says: "A third kind and that which is most commonly spoken "of by the technical name is the continuous doing of some- "thing which interferes with another's health or comfort in "the occupation of his property, such as carrying on a noisy "or offensive tra le."

In *Hare's Am. Constitutional Law*, 413, in commenting on *Richardson* vs. *The Central Railroad Co.*, 25 Vt., 465, where recovery of damages was sustained, although no portion of plaintiff's soil was directly taken, it is said : "If a statute may "be pleaded in justification of injuries that would constitute a "private nuisance if occasioned by an individual, it can only be "by virtue of the right of eminent domain attended with com- "pensation. * * * The legislature have not the omnipo- "tence of Parliament, and cannot deprive any man of his "property without compensation ; and such a deprivation "occurs whenever lands, tenements, or hereditaments are ren-

"dered valueless by an act which would afford a ground for "damages at common law."

In Wood on Nuisances, section 495, page 576, it is said:—

"Therefore every use of one's property that produces an "unwarrantable impregnation of the atmosphere with foreign "substances to the detriment of another is a nuisance and "actionable as such. This is true, whether the injury arises "from smoke, noxious vapors, noisome smells, or from loading "the atmosphere with dust, chaff, or other foreign substances "that would not exist there except for the act of the party "through whose instrumentality it is communicated."

Again, see the same work at page 693, section 611:—

"It is now well settled that noise alone, unaccompanied with "smoke, noxious vapors, or noisome smells, may create a "nuisance and be subject of an action at law for damages, in "equity for an injunction, or of an indictment as a public "offense."

"In *Crump* vs. *Lambert* (L. R., 3 Eq. Cas., 409), that emi-"nent English jurist, Lord Romilly, said: 'With respect to the "'question of law, I consider to be established by numerous "'decisions that smoke unaccompanied with noise or noxious "'vapor, that *noise* alone, that offensive vapors alone, although "'not injurious to health, may severally constitute a nuisance to "'the owner of neighboring or adjoining property. That if "'they do so substantial damages may be recovered at law, and "'that this court, if applied to, will restrain the continuance of "'the nuisance by injunction in all cases where substantial "'damages could be recovered at law.'"

Again, see the same work at page 603, section 514:—

"The fact that the trade producing smoke to an extent to "become a nuisance is a lawful trade, or that it was carried on "for purposes that are necessary and useful to the community, "or that it is carried on in a reasonable and proper manner, or "in a proper place, will not operate to relieve the owner from "liability if the trade, *in fact*, is productive of such ill results "to others as to make it a nuisance."

We submit that the question is not whether the railroad company defendant is conducting a business within the scope of its powers by the best known and approved methods, as was

ruled by the court below, but rather whether, in so conducting its business, it "takes, injures, or destroys" the property of another. It has a right to conduct its business, and so has an individual, but the individual who would so conduct his business as to shake your house so as to render it uninhabitable could be restrained; but the corporation, invested with the power of eminent domain, could not be restrained, but has the right to continue to inflict this injury in perpetuity.

We think the court below here misapplied the maxim *damnum absque injuria* to damages of the kind suffered by the plaintiff, on the ground that they arose from a reasonable exercise of the defendant's rights on its property.

For what a man may do in the enjoyment of his own property without being answerable in damages we refer to

Radcliff's Executors vs. *The Mayor, &c., of Brooklyn*, 4 N. Y., 195;

Same case in *Hare's Am. Const. Law*, 398.

We submit, however, that no single case can be cited that it is within the reasonable use of property to maintain a nuisance upon it which does special damage to one's neighbor, and we think under the authorities heretofore cited and the general principles governing the law of nuisances that the maintaining and operating of the defendant's railroad as shown in this case would be a nuisance if maintained by a private citizen.

The evidence in this case showed the existence of a nuisance which caused special damage, and a damage that was directly incident to the use and operation of the railroad, and which would continue, in contemplation of law, for all time. The ordinary rule to measure the damage in an action for maintaining a nuisance, therefore, does not apply, because the object in view is not to prevent the recurrences of the nuisance, but to give compensation for the right to inflict it continuously.

The defendant of its own volition located a line of railroad and proceeded to construct the same; the object of the Constitution was to give a right to just compensation *once* for *all* not only to such owners as should have their property condemned for the purposes of the railroad, but also to every other person

whose property was "injured or destroyed," that is, depreciated in value by the location, construction, and operation of the railroad. It was to extend the rule of damages in reference to property "taken" to property "injured or destroyed" that this further limitation was added in the Constitution.

What more reasonable measure of damage could be adopted than the difference in values before and after the construction of the railroad? What other measure would give just compensation to the plaintiff? It is the depreciation in the value of his property which measures the amount of the owner's injury. The compensation he is entitled to is the same as if a part had been "taken" plus the value of the part taken. He never can bring another action for such injuries. For the *negligent* operation of the road he may bring action as often as the negligence occurs, but that question is not involved in this case.

Irrespective of the foregoing citations, we think the authorities in this court not only sustain our right of action as an injury for which a common law action would lie, but also that the depreciation of the value of plaintiff's property by the construction and operation of defendant's railroad is a taking of property within the protection of the Constitution of the United States, and to deny the right to compensation therefor by the court below is to deprive the plaintiff of her property without due process of law.

In *Pumpelly* vs. *Green Bay Co.*, 13 Wall, 166, which was an action to recover damages for an overflow caused by a dam erected under authority of law in the State of Wisconsin, whose Constitution ordained that "the property of no person "shall be taken for public use without just compensation "therefor," this court held:—

"3. By the general law of European nations and the com- "mon law of England it was a qualification of the right of "eminent domain that compensation should be made for pri- "vate property taken or sacrificed for public use.

"4. And the constitutional provisions of the United States "and of the several States which declare that private property "shall not be taken for public use without just compensation "were intended to establish this principle beyond legislative "control.

"5. It is not necessary that property should be absolutely "*taken* in the narrowest sense of that word to bring the case "within the protection of this constitutional provision. There "may be such serious interruption to the common and neces- "sary use of property as will be equivalent to a taking within "the meaning of the Constitution."

Mr. Justice Miller, in delivering the opinion of this court, says (page 177):—

"It would be a very curious and unsatisfactory result, if, in "construing a provision of constitutional law, always under- "stood to have been adopted for protection and security to the "rights of the individual as against the government, and which "has received the commendation of jurists, statesmen, and "commentators as placing the just principles of the common "law on that subject beyond the power of ordinary legislation "to change or control them, it shall be held that if the govern- "ment refrains from the absolute conversion of real property "to the uses of the public it can destroy its value entirely, can "inflict irreparable and permanent injury to any extent, can, in "effect, subject it to total destruction without making any "compensation, because, in the narrowest sense of that word, "it is not taken for public use. Such a construction would "pervert the constitutional provision into a restriction upon the "rights of the citizen, as those rights stood at the common "law, instead of the government, and make it an authority for "invasion of private right under the pretext of the public "good, which had no warrant in the laws or practice of our "ancestors."

"In the case of Simmickson *vs.* Johnson (2 Harrison, New "Jersey, 129), the defendant had been authorized by an Act "of the legislature to shorten the navigation of Salem Creek "by cutting a canal, and by building a dam across the stream. "The canal was well built, but the dam caused the water to "overflow the plaintiff's land, for which he brought suit. Al- "though the State of New Jersey then had no such provision "in her Constitution as the one cited from Wisconsin, the "Supreme Court held the statute to be no protection to the ac- "tion for damages. Dayton, J., said that this power to take "private property reaches back of all constitutional provisions; "and it seems to have been a settled principle of universal "law that the right to compensation is an incident to the ex- "ercise of that power; that the one is inseparably connected "with the other; that they may be said to exist not as sepa- "rate and distinct principles, but as parts of one and the same "principle. For this proposition he cites numerous authori-

"ties, but the case is mainly valuable here as showing that "overflowing land by backing the water on it was considered "'as taking' it within the meaning of the principle.

"In the case of Gardner *vs.* Newburgh (2 Johnson's Chan- "cery, 162), Chancellor Kent granted an injunction to prevent "the trustees of Newburgh from diverting the water of a cer- "tain stream flowing over plaintiff's land from its usual course, "because the Act of the legislature which authorized it had "made no provision for compensating the plaintiff for the in- "jury thus done to his land. And he did this though there "was no provision in the Constitution of New York such as "we have mentioned, and though he recognized that the water "was taken for a public use. After citing several continental "jurists on this right of eminent domain, he says that while "they admit that private property may be taken for public "uses when public necessity or utility requires, they all lay it "down as a clear principle of natural equity that the individual "whose property is thus sacrificed must be indemnified. And "he adds that the principles and practice of the English "Government are equally explicit on this point. It will be "seen in this case that it was the diversion of the water from "the plaintiff's land which was considered as taking private "property for public use, but which, under the argument of "the defendants' counsel would, like overflowing the land, be "called only a consequential injury."

"If these be correct statements of the limitations upon the "exercise of the right of eminent domain, as the doctrine was "understood before it had the benefit of constitutional sanction "by the construction now sought to be placed upon the Con- "stitution, it would become an instrument of oppression rather "than protection to individual rights."

In Hare's American Constitutional Law, page 347, that eminent jurist says:—

"Whichever interpretation is adopted, it would seem obvious "that the right of eminent domain could hardly be exercised "without compensation in the face of the language of the same "amendment, drawn from Magna Charta, that no person shall "be deprived of life, liberty, or property without due process "of law, which, though originally intended to check the arbi- "trary power of the crown, is a salutary restraint on all "branches of our government. Like provisions exist in the "State Constitutions, and their observance is now guaranteed "by the Fourteenth Amendment of the Constitution of the "United States.

"We may, therefore, believe that compensation is a correl-
"ative, without which the right to take property for public
"use would be tantamount to confiscation, and would conse-
"quently be due if there were no constitutional guaranties.
"For, as eminent domain is, as we have seen, simply a right to
"compel the citizen to sell at a price ascertained according to
"some just method of computation, the obligation of the
"government to pay is not less clear than that of the owner to
"surrender. Compensation has accordingly gone hand in
"hand with the right of taking property for public purposes
"in all civilized countries, and been regarded as essential to
"its legitimate exercise, even under despotic rule. They
"were treated as inseparable by the Continental jurists, and
"such is the principle and practice of the English Govern-
"ment. Such should obviously be the rule in the United
"States, because the right is not conferred in terms; and when
"power arises by implication, it is also implied that they shall
"be exercised in conformity to the principles which the
"colonists brought with them from England and sought to
"establish in the new land beyond the sea. This was among
"the grounds assigned by the framers of the Constitution for
"not inserting a bill of rights; and if experience has shown
"that they erred, it was not so much from the insufficiency of
"the reason as because the restraints on despotic power should
"be formulated in terms that cannot be misunderstood."

In the *Baltimore & Potomac R. R. Co.* vs. *Fifth Baptist Church*, 108 U. S., 317, the suit was brought to recover damages for the injury and annoyance to the plaintiffs, in the use of their church as a place of worship, by smoke, dust, and noises proceeding from the defendant's works and locomotives, and it was held not to be a defense that the company were authorized by Congress to bring their tracks within the limits of Washington and to construct such works as were necessary and expedient for the completion and maintenance of their road.

Mr. Justice Field, delivering the opinion of this court, says, page 331:—

"It admits, indeed, of grave doubt whether Congress could
"authorize the company to occupy and use any premises within
"the city limits in a way which would subject others to physi-
"cal discomfort and annoyance in the quiet use and enjoyment
"of their property and at the same time exempt the company
"from liability to suit for damages or compensation to which

"individuals acting without such authority would be subject, "under like circumstances. Without expressing any opinion "on this point it is sufficient to observe that such authority "would not justify an invasion of other's property to an extent "which would amount to an entire deprivation of its use and "enjoyment without compensation to the owner. * * * "The acts that a legislature may authorize, which, without such "authorization, would constitute nuisances, are those which af- "fect public highways or public streams, or matters in which "the public have an interest and over which the public have "control. The legislative authorization exempts only from li- "ability to suits, civil or criminal, at the instance of the State; "*it does not affect any claim of a private citizen for damages for* "*any special inconvenience and discomfort not experienced by* "*the public at large.*"

We submit that the court below in ruling this case have endeavored to establish an arbitrary distinction not known to the law. We think the principle governing the case of *Pennsylvania Railroad* vs. *Duncan*, 111 Pa. St. Rep., 352, and 132 U. S. Rep., 75, is identical with the case in hand.

Mr. Duncan was the owner of property situate at the northwest corner of Filbert Street and Twenty-third Street; the defendants' elevated railroad is erected at this point on pillars with foundations in the bed of Filbert Street. Under all the cases in Pennsylvania prior to the Constitution of 1874, Mr. Duncan had no right of action for the damage to his property; the court below, however, held in that case, and have continued to hold in all subsequent cases where the property was similarly located, that such an abutting owner was entitled to compensation. In the present case the railroad is built on a stone and brick viaduct erected along the south side of Filbert Street. The only difference between the two classes of cases is the difference in the number of feet and inches which the structure is removed from the respective properties injured. The damage is of the same kind, it only differs in degree. The access to the property is more interfered with in one case than the other but that only gives an additional element of damage, it does not affect the question of right of action.

Can any authority be cited that a *right* of action against one maintaining a nuisance was ever dependent upon the distance

that the nuisance was removed from the property injured? The probability of special damage may be less where the party complaining is at a greater distance from the source of injury, but it is nevertheless a question of fact to be determined in each case by the jury under proper instructions from the court as to what is special damage. It would not be an improbable case to suppose noxious deposits escaping from a chimney which would do no special damage to those in the immediate vicinity, and yet give a right of action to those further removed by reason of the deposits being carried by the wind and falling on their property. If our view is correct both classes of property-owners from the same causes suffer a special damage, the same in kind but varying in degree, for which an action would lie at common law, and each are alike entitled to compensation for the depreciation in the value of their respective properties by the acts of the defendant.

That is, a private citizen who should on his own land build and operate a railroad which would so injuriously affect his neighbor's property as the defendant has done in this case would be liable in damages to the amount of the injury sustained, and the *right* of action would be the same, whether a highway intervene or not.

We think, therefore, the court below erred in reversing the judgment in favor of the plaintiff because he had a good cause of action:—

First.—Under the common law in the absence of any constitutional guarantees.

Second.—Under the provisions of the Constitution of Pennsylvania, which requires just compensation to be made for private property "taken, injured, or destroyed" for public use.

Jurisdiction.

Has this court jurisdiction to correct the error? We think it has.

As stated at the head of our brief we invoked the jurisdiction of the court on two grounds:—

I. The plaintiff has been deprived of his property without due process of law; and,

II. The Supreme Court of Pennsylvania denied to plaintiff the equal protection of the laws.

I.

The full force and effect that is to be given to the limitation on the power of the several States of the Union to deprive a citizen of his property without due process of law must be determined as the necessities of our civilization develop.

In commenting on the phrase "due process of law," Judge Hare, in his American Constitutional Law, page 749, says:—

"Time has given them a sanction which is wanting to new-"invented formulas, and when understood and applied aright "they afford a protection against arbitrary power which in-"cludes all that is essential in the other constitutional safe-"guards, and renders them superfluous. When it is said, in "effect, that no one shall be deprived of any natural right, "save by the judgment of a duly constituted tribunal proceed-"ing conformably to established rules and principles, and with "an opportunity for a trial by jury if the question is one of "fact, all has been said that is possible to human foresight, "and the rest must be left to the good sense and virtue of the "people, and of those to whom they intrust the reins of gov-"ernment."

Due process of law and similar phrases in the several Constitutions of the States are designed to protect the citizen from the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice. See *Bank of Columbia* vs. *Oakley*, 4 Wharton, 235.

As to what is a deprivation of property, see *Hare's Am. Const. Law, page* 755, where it is said:—

"The Constitution does not define the deprivation which it "prohibits, but the authorities establish that it need not be "entire or consist in the dispossession of the owner or destruc-"tion of the thing, and may, on the contrary, arise from an "act which renders the thing less useful or valuable, or a law "forbidding its appropriate use and enjoyment, although the "owner is not dispossessed. Backing the water of a stream "on a man's land, or diverting the stream from his land, is "consequently a taking or deprivation, whether the dam is

"erected on his land or elsewhere; and so if acts which, "though done off the land, constitute a nuisance and render it "less valuable pecuniarily or unfit for habitation. It is imma- "terial in this regard that the act complained of is done under "an authority conferred by law and for a public use if it is "unattended with compensation, and transcends the limits "within which an owner may exercise his own rights without "being responsible for the consequences to others."

We think the principles involved in the case of *Head* vs. *Amoskeag Manufacturing Company*, 113 U. S., 9, rule this case not only on the question of jurisdiction, but also that this court is not conclusively bound by the ruling of the court below, but is at liberty to examine the ruling and reverse the judgment if not consonant with this court's view of the law governing the rights of the parties litigant.

That case was a writ of error to reverse a judgment of the Supreme Court of New Hampshire against the plaintiff in error upon a petition filed by the defendant in error for the assessment of damages for the flowing of his land by its mill-dam at Amoskeag Falls, on the Merrimac River, under the general mill Act of that State. The petition alleged that the company was authorized by law to build the dam which caused Head's lands to be flooded, and that they could not agree upon or adjust the damages, and prayed that the damages might be assessed according to the statute. Head objected that the statute was unconstitutional and that the petition could not be maintained, because they contemplated the taking of his property for private use, contrary to the provisions of the Constitution of the United States and of the State. His objections were overruled by the highest court of New Hampshire and final judgment was entered, and that upon the payment or tender of the damages awarded under the statute the company should have the right to erect and maintain the dam and to flow his land forever to the depth and extent to which it might or could be flowed or injured thereby.

Mr. Justice Gray, delivering the opinion of this court, says (page 15):—

"The position that the plaintiff in error has been denied the "equal protection of the laws was not insisted upon at the ar-

"gument. The single question presented for decision is "whether he has been deprived of his property without due "process of law, in violation of the Fourteenth Amendment of "the Constitution of the United States. It is only as bearing "upon that question that this court upon writ of error to a "State Court has jurisdiction to consider whether the statute "conforms to the Constitution of the State.

* * * * * * *

"The plaintiff in error contends that his property has been "taken by the State of New Hampshire for private use, and that "any taking of private property for private use is without due "process of law.

"The defendant in error contends that the raising of a water-"power upon a running stream for manufacturing purposes is "a public one: that the statute is a constitutional regulation "of the rights of riparian owners; and that the remedy given "by the statute is due process of law."

The opinion then proceeds to examine the general law on the subject, whether such a use is a public or private one, but the court declined to express an opinion whether it could be upheld as a taking by delegation of the right of eminent domain of private property for public use, but affirmed the judgment on the ground that a statute (page 21) —

"Regulating the manner in which the rights of proprietors "of lands adjacent to a stream may be asserted and enjoyed, "with a due regard to the interests of all and to the public "good, is within the constitutional power of the legislature."

Page 26:—

"The statute does not authorize new mills to be erected to "the detriment of existing mills and mill privileges; *and by* "*providing for an assessment of full compensation to the owners* "*of land flowed, it avoids the difficulty which arose in the case* "*of Pumpelly* vs. *Green Bay Co., 13 Wall., 166.*"

"Being a constitutional exercise of legislative power, and "providing a suitable remedy, by trial in the regular course of "justice, to recover compensation for the injury to the land of "the plaintiff in error, it has not deprived him of his property "without due process of law in violation of the Fourteenth "Amendment of the Constitution of the United States."

One great difference between the foregoing case and the case in hand is that the defendant in this case has taken the plaintiff's property for a public use without compensation and the Supreme

Court of the State has denied him a remedy to recover compensation.

Would there be any doubt of the jurisdiction of this court to hear and reverse a judgment of the Supreme Court of Pennsylvania which should hold that the defendant, under its privilege of taking private property for public use, having "taken," in the literal sense of the word, the house of the plaintiff, was not bound to make compensation therefor? Manifestly not. Then the question resolves itself into this, what is a taking or deprivation of property?

Under the *Baltimore & Potomac Rd. Co.* vs. *Fifth Baptist Church*, *supra*, and *Pumpelly* vs. *Green Bay Co.*, *supra*, the plaintiff has sustained an injury for which she is entitled to an action. Her property has been depreciated in value by the defendant acting under the authority of the State of Pennsylvania.

We submit that as to what is a taking of private property for public use the decisions of the Supreme Court of Pennsylvania are not conclusive on this court. It is a question of general law in which their opinion is entitled only to the weight of other equally respectable courts.

The Supreme Court of Pennsylvania, by holding that the plaintiff has had no property taken or applied to public use by the defendant, does not conclude the question so as to prevent this court from inquiring whether or not under the general principles of law the plaintiff has been deprived of her property for public use without compensation, which would be without due process of law.

As shown by the opinion in this case, the court below concedes that the words "injured or destroyed" in the Constitution of the State are intended to protect against such legal wrong as would be the subject of an action for damages at common law; that for such injuries corporations and individuals stand on the "same plane of responsibility;" that the Constitution gives a remedy for legal wrongs and not for such injuries as were *damnum absque injuria*, and that the damage suffered by the plaintiff was of that character, and therefore she

had no right of action. The answer to this proposition is, we submit, one of general law and not of statutory or constitutional construction.

This court is not bound by the rulings of a State court when the question is one of general law or jurisprudence.

Township of Pine Grove vs. *Talcott*, 19 Wall., 666;
Venice vs. *Murdock*, 92 U. S. (II. Otto), 494, 501.

Nor by a construction given to a State Constitution or statute where in conflict with the Federal Constitution or laws or with the fundamental principles of justice.

Murray vs. *Gibson*, 15 Howard, 421.

In Tennessee *vs.* Davis, 100 U. S. Rep., 257, it is ruled that:—

"3. The United States is a government with authority over "the whole territory of the Union, acting upon the States and "the people of the States. While limited in the number of "its powers it is, so far as its sovereignty extends, supreme. "No State can exclude it from exercising them, obstruct its "authorized officers against its will, or withhold from it, for a "moment, the cognizance of any subject which the Constitu- "tion has committed to it."

"6. A case arises under that Constitution not merely where "a party comes into court to demand something conferred "upon him by the Constitution, a law of the United States, "or a treaty, but wherever its correct decision as to the right, "privilege, claim, protection, or defense of a party, in whole "or in part, depends upon the construction of either."

In *Yesler* vs. *Washington Harbor Line Commissioners*, 146 U. S. Rep., 646, the Chief Justice, delivering the opinion of the court, says, page 655:—

"The amendment undoubtedly forbids any arbitrary depri- "vation of life, liberty, or property, and secures equal pro- "tection to all under like circumstances in the enjoyment of "their rights."

See also

Kankanna Water Power Co. vs. *Green Bay, &c., Company*, 142 U. S., 254.

II.

The reversal of the judgment in favor of the plaintiff by the Supreme Court of Pennsylvania denied to her the equal protection of the laws.

This clause is intended, we think, to be supplemental to the clause providing for due process of law. If we construe it correctly it is intended that after one has appeared in a duly constituted court such person shall have no unjust and arbitrary discrimination made against him in the administration of law, but that he shall be entitled to have the law ruled in his case as it is in that of other citizens similarly situated.

In Caldwell *vs.* Texas, 137 U. S., 692, it is ruled :—

"No State can deprive particular persons or classes of persons "of equal and impartial justice under the law without violating "the provisions of the Fourteenth Amendment to the Consti- "tution.

"Due process of law within the meaning of the Constitu- "tion is secured where the laws operate on all alike, and no "one is subject to partial or arbitrary exercise of the powers "of government."

The Chief Justice, delivering the opinion of the court, says, page 697 :—

"By the Fourteenth Amendment the powers of the States in "dealing with crime within their borders are not limited, but "no State can deprive particular persons or classes of persons "of equal and impartial justice under the law. Law in its "regular course of administration through courts of justice, is "due process, and, when secured by the law of the State, the "constitutional requisition is satisfied. 2 Kent Comm., 13. "And due process is so secured by laws operating on all alike, "and not subjecting the individual to the arbitrary exercise of "the powers of government, unrestrained by the established "principles of private right and distributive justice. Bank of "Columbia *vs.* Okely, 4 Wheat., 235, 244. The power of the "State must be exerted within the limits of those principles, "and its exertion cannot be sustained when special, partial, "and arbitrary. Hurtado *vs.* California, 110 U. S., 516, 535.

How is this arbitrary and unjust discrimination to be ascertained. One way, we submit, and possibly the most satisfactory,

would be to determine whether in the particular case the court had ruled against the accepted and well-established principles of the law which should govern the case, and this would be made all the more certain if it could be shown that the same court at the same time was applying the same general principles to other suitors in a different manner.

We submit that in this case it is an unjust and arbitrary exercise of the powers of government for the Supreme Court of Pennsylvania, under the same constitutional guarantees to allow compensation to be recovered by Mr. Duncan and that class of abutting owners and denied to the plaintiff when there is, as we think we have hereinbefore shown, no difference in principle between the two classes of cases.

That is, while the Supreme Court of Pennsylvania have endeavored to set up a distinction between the cases there is no real distinction in law between them. The rules of law that, give one class a right to compensation for the injuries sustained apply with equal force to the other. The attempted distinction founded on the occupancy of the bed of Filbert Street is a distinction which affects alone the *quantum* of damage and not the *right* of action.

The one class of owners had their property "injured or des-"troyed" in the same manner and by the same agencies as the other.

The prior decisions in Pennsylvania and the debates in the Constitutional Convention show that the object of adding the words "injured or destroyed" to the previous limitations on the power of eminent domain, was to give compensation to owners of property in the vicinity of public works for the damage done to their property by the erection and operation thereof. It was to extend the rule of damage, which had theretofore obtained when a part of the property was "taken," to such as should be "injured or destroyed" but not "taken." If this is the correct view, and who can doubt it under the authorities cited, then is it not an arbitrary and unjust distinction, founded on no principle of law, to give compensation to one class of citizens and deny it to another, including the plaintiff, when both classes are injured in the same manner

and by the same acts, if not to the same extent? We submit, under this branch of our argument, that the decisions of the Supreme Court of Pennsylvania are not conclusive on this court, because the question involved is not the construction of the Constitution of Pennsylvania, but, rather, whether under the general principles of law there is any difference between the two classes of cases. The Supreme Court of Pennsylvania bases its ruling on the ground that for such injuries there never was at common law a right of action against any one, and it concedes that under the Constitution of Pennsylvania corporations, invested with the privilege of taking private property for public use, and private citizens are on the same plane of common law responsibility. If this proposition be true, and the opinion of the court shows it is true (record, page 62), then it is a question not of construction of a State Constitution by its highest tribunal, but an assertion of a principle of general law, which this court is at liberty to examine and determine for itself.

We think, therefore, that this court has jurisdiction not only to hear this cause, but to determine as to justice and right belong.

The defendant, by authority of the State of Pennsylvania, has taken the plaintiff's property for a public use, and the Supreme Court of the State has denied to the plaintiff a right of action to recover from the defendant the value thereof, thereby depriving the plaintiff of her property without due process of law, and has denied to her the equal protection of the laws by construing the Constitution of Pennsylvania to include one class of citizens and to exclude the plaintiff, when the rights of action were the same in both cases, and governed by the same principle of law.

M. HAMPTON TODD,
Pro Plaintiff.

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153-380

No. 221. October Term, 1893.

Supreme Court of the United States.

Adeline B. Marchant, Administratrix of Edward D. Marchant, Deceased, Plaintiff in Error,

vs.

The Pennsylvania Railroad Company, Defendant in Error.

ERROR TO THE COURT OF COMMON PLEAS, No. 3, FOR THE COUNTY OF PHILADELPHIA, STATE OF PENNSYLVANIA.

BRIEF OF DEFENDANT IN ERROR.

A. H. WINTERSTEEN,
WAYNE MacVEAGH,
For Defendant in Error.

Allen, Lane & Scott, Prs., Phila.

APPENDIX.

CONSTITUTION OF PENNSYLVANIA, 1874.

DECLARATION OF RIGHTS.

ARTICLE I.

SECTION 9. In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or information, a speedy public trial, by an impartial jury, of the vicinage; he cannot be compelled to give evidence against himself, *nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land.*

SEC. 10. No person shall, for any indictable offense, be proceeded against criminally, by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; or by leave of the court, for oppression or misdemeanor in office. No person shall, for the same offense, be twice put in jeopardy of life or limb; *nor shall private property be taken or applied to public use, without authority of law, and without just compensation being first made or secured.*

SEC. 11. All courts shall be open, and every man, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law and right and justice, administered without sale, denial, or delay. Suits may be brought against the Commonwealth, in such manner, in such courts, and in such cases as the legislature may by law direct.

Article XVI.

Of Private Corporations.

Section 1. All existing charters or grants of special or exclusive privileges under which a *bona fide* organization shall not have taken place and business been commenced in good faith at the time of the adoption of this Constitution shall thereafter have no validity.

Sec. 2. The General Assembly shall not remit the forfeiture of the charter of any corporation now existing, or alter or amend the same, or pass any other general or special law for the benefit of such corporation, except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of this Constitution.

Sec. 3. The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the General Assembly from taking the property and franchise of incorporated companies and subjecting them to public use, the same as the property of individuals, and the exercise of the police power of the State shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the State.

Sec. 4. In all elections for directors or managers of a corporation each member or shareholder may cast the whole number of his votes for one candidate or distribute them upon two or more candidates, as he may prefer.

Sec. 5. No foreign corporation shall do any business in this State without having one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served.

Sec. 6. No corporation shall engage in any business other than that expressly authorized in its charter; nor shall it take or hold any real estate, except such as may be necessary and proper for its legitimate business.

Sec. 7. No corporation shall issue stocks or bonds, except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be

void. The stock and indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained at a meeting to be held after sixty days' notice, given in pursuance of law.

SEC. 8. Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction. The General Assembly is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporations or individuals made by viewers or otherwise; and the amount of such damages, in all cases of appeal, shall, on the demand of either party, be determined by a jury, according to the course of the common law.

SEC. 9. Every banking law shall provide for the registry and countersigning, by an officer of the State, of all notes or bills designed for circulation; and that ample security to the full amount thereof shall be deposited with the Auditor-General, and for the redemption of such notes or bills.

SEC. 10. The General Assembly shall have the power to alter, revoke, or annul any charter of incorporation now existing, and revocable at the adoption of this Constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of this Commonwealth, in such manner, however, that no injustice shall be done to the corporators. No law hereafter enacted shall create, renew, or extend the charter of more than one corporation.

SEC. 11. No corporate body to possess banking and discounting privileges shall be created or organized, in pursuance of any law, without three months' previous public notice, at the place of the intended location, of the intention to apply for such privileges, in such manner as shall be prescribed by law, nor shall a charter for such privileges be granted for a longer period than twenty years.

SEC. 12. Any association or corporation organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph within this State, and to connect the same with other lines; and the General Assembly shall, by general law, of uniform operation, provide reasonable regulations to give full effect to this section. No telegraph company shall consolidate with, or hold a controlling interest in the stock or bonds of any other telegraph company owning a complete line, or acquire, by purchase or otherwise, any other competing line of telegraph.

SEC. 13. The term "corporations," as used in this article, shall be construed to include all joint stock companies or associations having any of the powers or privileges of corporations not possessed by individuals or partnerships.

ARTICLE XVII.

Of Railroads and Canals.

SECTION 1. All railroads and canals shall be public highways, and all railroad and canal companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any points within this State, and to connect at the State line with railroads of other States. Every railroad company shall have the right, with its road, to intersect, connect with, or cross any other railroad; and shall receive and transport each the other's passengers, tonnage, and cars, loaded or empty, without delay or discrimination.

SEC. 2. Every railroad and canal corporation organized in this State shall maintain an office therein, where transfers of its stock shall be made, and where its books shall be kept for inspection by any stockholder or creditor of such corporation, in which shall be recorded the amount of capital stock subscribed or paid in, and by whom, the names of the owners of its stock, and the amounts owned by them, respectively, the transfers of said stock, and the names and places of residence of its officers.

SEC. 3. All individuals, associations, and corporations shall

have equal right to have persons and property transported over railroads and canals, and no undue or unreasonable discrimination shall be made, in charges for, or in facilities for, transportation of freight or passengers within the State, or coming from or going to any other State. Person and property transported over any railroad shall be delivered at any station, at charges not exceeding the charges for transportation of persons and property of the same class, in the same direction, to any more distant station; but excursion and commutation tickets may be issued at special rates.

SEC. 4. No railroad, canal, or other corporation, or the lessees, purchasers, or managers of any railroad or canal corporation, shall consolidate the stock, property, or franchise of such corporation, with, or lease, or purchase the works or franchises of, or in any way control, any other railroad or canal corporation, owning or having under its control a parallel or competing line; nor shall any officer of such railroad or canal corporation act as an officer of any other railroad or canal corporation, owning or having the control of a parallel or competing line; and the question whether railroads or canals are parallel or competing lines shall when demanded by the party complainant, be decided by a jury, as in other civil issues.

SEC. 5. No incorporated company doing the business of a common carrier shall directly or indirectly prosecute or engage in mining or manufacturing articles for transportation over its works; nor shall such company directly or indirectly engage in any other business than that of common carriers, or hold or acquire lands, freehold or leasehold, directly or indirectly, except such as shall be necessary for carrying on its business; but any mining or manufacturing company may carry the product of its mines and manufactories on its railroad or canal, not exceeding fifty miles in length.

SEC. 6. No president, director, officer, agent, or employé of any railroad or canal company shall be interested, directly or indirectly, in the furnishing of materials or supplies to such company, or in the business of transportation as a common carrier of freight or passengers over the works owned, leased, controlled, or worked by such company.

SEC. 7. No discrimination in charges or facilities for transportation shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback, or otherwise, and no railroad or canal company, or any lessee, manager, or employé thereof, shall make any preferences in furnishing cars or motive power.

SEC. 8. No railroad, railway, or other transportation company shall grant free passes, or passes at a discount, to any persons except officers or employés of the company.

SEC. 9. No street passenger railway shall be constructed within the limits of any city, borough, or township without the consent of its local authorities.

SEC. 10. No railroad, canal, or other transportation company in existence at the time of the adoption of this article shall have the benefit of any future legislation by general or special laws, except on condition of complete acceptance of all the provisions of this article.

SEC. 11. The existing powers and duties of the Auditor-General in regard to railroads, canals, and other transportation companies, except as to their accounts, are hereby transferred to the Secretary of Internal Affairs, who shall have a general supervision over them, subject to such regulations and alterations as shall be provided by law; and in addition to the annual reports now required to be made, said secretary may require special reports at any time upon any subject relating to the business of said companies from any officer or officers thereof.

SEC. 12. The General Assembly shall enforce, by appropriate legislation, the provisions of this article.

PENNSYLVANIA R. R. CO. *vs.* JOSHUA W. LIPPINCOTT;
SAME *vs.* THE CHURCH OF THE COVENANT;
SAME *vs.* ELLEN Y. STERNER, ADM'X;
SAME *vs.* GEORGE W. HUNTER:

Error to the Courts of Common Pleas, No. 4 and No. 2, of Philadelphia, reported 116 Pa. St. Rep., 472.

Opinion of Mr. Justice Gordon:—

The above-named three several cases, involving, as they do, similar facts and principles of law, and having been argued together, we dispose of in one opinion. The actions are case, and the plaintiffs, who own property on the north side of Filbert Street, in the city of Philadelphia, severally complain that the Pennsylvania Railroad Company, being a corporation duly chartered under the laws of this State, and invested with the privilege of taking private property for its corporate use, did, on the first day of May, 1881, construct, as an extension of its system of tracks and road-bed, a viaduct or elevated roadway, and railroad thereon, along the south side of Filbert Street, opposite to their several lots of ground. That since December 1st, 1881, the said company defendant has used and operated the said viaduct, in connection with its other tracks, as a continuous line of railroad for the transportation of passengers and freight to and from its terminal passenger and freight station, and as a yard for shifting and making up trains. That in consequence of the noise, disturbance, smoke, sparks, and noisome and unhealthy vapors, occasioned and emitted by the defendant's cars and locomotives, great injury has been done to the plaintiff's property. It is not alleged that any injury has resulted from the erection of this elevated roadway, nor, indeed, could it truthfully be so alleged; for the erection is on the defendant's own ground, on the south side of the said street, which street is some fifty-one feet wide, so that no part of the plaintiff's property, or any right of way, or other appurtenance thereunto belonging, has been taken or used in the erection or construction of said viaduct. The damage complained of results wholly from the manner in which the roadway is used; results from the noise, smoke, and dust arising from the use of the engines and cars, the necessary consequence of the use of the property as a steam railway. As the allegations thus made were in whole or in part supported by evidence, the learned judge instructed the jury that the measure of damage would be the difference between the market value of the several properties before the building of the viaduct and the same value after the structure was completed. In other

words, the same rule was applied to the cases in hand as that which applies in the case of an appropriation or taking under the right of eminent domain, excepting, of course, that as no property of any kind was taken that element of damage was not considered. This instruction, together with the negative answer of the court to the defendant's first point, raises all the questions that require consideration in this case.

That there was error in the instruction above stated is, to us, very clear. This structure having been erected on the defendant's own land, and no property or right of the plaintiffs having been seized, appropriated, or interfered with, we cannot understand how a rule which applies only to a taking and never did apply to anything else can be adapted to a case where there has been no such taking. It is not pretended that the erection itself did the plaintiffs any harm, but its use only; that is, the running of locomotives on it. We agree, indeed, that if the ordinary and proper use of the railway is to be regarded as an element of damage, as to a certain extent it is in the case of a condemnation, the rule stated is the correct one; but as this rule is not one of common law but of statute, it cannot apply to the case now being considered: Railroad Company *vs.* Yeiser, 8 Penn. St., 366. Unless, therefore, the case can be brought within some statute, the rule by which damages are measured by advantages and disadvantages ought not to have been adopted; for, as was said in the case cited, per Mr. Justice Rogers, "it is a principle well settled by many adjudicated cases, that an action does not lie for a reasonable use of one's right, though it be to the injury of another. For the lawful use of his own property a party is not answerable in damages, unless on proof of negligence." How, then, we ask, can a lawful erection by the Pennsylvania Railroad Company, on its own ground, be the subject of damages to the adjoining land-owners? And why may it not, as put by the defendant's first point, operate and use, in a lawful manner, its Filbert Street branch without subjecting itself to an action for damage? It seems to be very clear that a private person could do with impunity, on his own property, just what the railroad company has done. He might build a house and thus shut out his neighbor's view, light, and air; he might build an

embankment, or run a road on or along his own line, and be liable for nothing as long as he used his house, embankment, or road in a lawful manner, although in either case an injury may have been done to the adjacent property.

Who does not know that even in the country no householder escapes injury and annoyance from clouds of dust raised in dry weather by the passage of teams over the common roads? And in the cities this grievance is further aggravated by the intolerable noise occasioned by the use of stone pavements. Nevertheless, we have yet to hear of a case where one lawfully using such road or street was held liable for the injury thus occasioned.

When a company takes, by its right of eminent domain, part of a tract of land, and the damage to the balance is to be measured by the advantage over the disadvantage resulting from the company's works, in such case, as we held in Searle *vs.* The Railroad Co., 33 Penn. St., 57, contingent and even imaginary damages may be considered by way of offset to the alleged advantages. But whilst this is so, such damages cannot be regarded as a substantive claim. And we have a reiteration of the same doctrine in the case of the New Castle & Franklin Railroad Co. *vs.* McChesney, 85 Penn. St., 522, wherein Mr. Justice Woodward remarks, citing the case abovenamed: "It is well settled, even under more comprehensive "legislation than this, that contingent damages cannot be taken "into account as a substantive claim for damages." How then, can we apply to the case in hand a rule of damages that never was applicable except under special circumstances which do not here exist?

It is contended, however, that this case is governed by the Constitution of 1874, which provides, article XVI., section 8, "Municipal and other corporations and individuals invested "with the privilege of taking private property for public use, "shall make just compensation for property taken, injured, or "destroyed, in the construction or enlargement of their works, "highways, or improvements;" and the cases of Pusey *vs.* The City of Allegheny, 98 Penn. St., 522; Pittsburgh Junction Railroad Co. *vs.* McCutcheon, 18 W. N. C., 527; Pennsylvania Railroad Co.'s App. *Id.*, 418, and the Pennsylvania

Railroad *vs.* Duncan, 111 Penn. St., 352, are cited in support of the rule contended for by the plaintiffs. But it is a mistake to suppose that these cases are in point. In the first, there was not only the construction of a road but an actual taking; in the Junction Railroad and Duncan cases, the injury arose directly from the construction of the works, and the taking and obstruction of the plaintiffs' rights of way; whilst the Pennsylvania Railroad Company's Appeal covers a case where, without warrant of law, the company laid its tracks on a public street of the borough of Middletown. In the case in hand, the plaintiffs sustained no injury from the construction of the viaduct; none of their property was taken, neither was any of their rights infringed; so that neither by the Constitution nor by the cases quoted, is there a warrant for the plaintiff's contention. We agree that over and beyond the damages which arise from a taking of property, whether in the shape of land or a right, the Constitution does impose on corporations a direct responsibility for every injury for which a natural person would be liable at common law; so we have held in the case of Edmundson *vs.* The Railroad Company, 111 Penn. St., 316, and to this doctrine we adhere, for such, we think, is the spirit of that instrument; but beyond this we cannot go. Nor is there any reason why we should depart from a rule so reasonable, and subject artificial persons to a burden which cannot be imposed upon natural persons.

As was said by Mr. Chief Justice Tilghman, in the case of Shrunk *vs.* The Navigation Co., 14 S. & R., 71, in his comment on the company's charter, which provided that compensation should be made "if any person or persons shall be injured by means of any dam or dams being erected as hereinafter mentioned;" "compensation shall be made," says the learned Chief Justice, "for all damages arising from immediate injury to property, but not for any damages where there is no legal injury, which is called *damnum absque injuria*. And upon reflection we will find that this was a wise restriction. There would be no end to damages for injuries, considered in the most extensive sense of the word. For not only may owners of land contiguous to the river complain of injury by obstruction of the ascent of the fish, but all other persons

"living in towns or on lands near the river. There are other "kinds of injury, too, sustained, particularly by owners of lands "on the river between Fairmount dam and the lower falls. All "these persons have lost the benefit of navigation free from "toll in batteaus, flats, &c., which was very useful, as it served "for carrying produce to market and bringing up manure for "their lands; yet it has not been contended that for such injuries "compensation is to be made. Suppose the health of the country "to be injured by the evaporation from the dam, is compensation "to be made for this, the greatest of all injuries? I presume "not. Where, then, are we to stop, or what is to be the bound-"ary, if we go beyond the line which I have mentioned?"

This is the language of a very learned jurist, and the case is all the more in point in that the wording of the charter of the Navigation Company and that of the present Constitution is very much alike. Nor would the onerous and ruinous consequences be less to the defendant than those which the learned chief justice shows might befall the canal company were the doctrine contended for adopted. Every person who has property in city or country within hearing of the noise or in reach of the dust of a railroad, or, for that matter, of a common road, might, in the case supposed, have damages to be estimated as in the taking of land, or as from a permanent injury arising from the construction of the railroad. If this Pennsylvania Company has been guilty of a nuisance; if in the use of its road it makes more smoke and dust than is lawfully allowable in the working of its machinery, and the plaintiffs are thereby injured, they have their remedy, but not for anything short of this. Any other rule would lead to this remarkable result, that the plaintiffs would be entitled to damages without having suffered any injury; that is, for anticipated damages, and for which a natural person could not be held liable. Moreover, the corporation would thus be made responsible for the manner in which it proposed to exercise its right, though such manner might not only be lawful, but the best possible, and the least injurious to the property of others. That the defendant might have hauled its freight and passenger by ordinary carriages drawn by horses from its West Philadelphia Depot, through Filbert Street to its station at Broad and Market, without the risk of actionable damage, will

I suppose, not be doubted ; yet, certainly the resulting noise, dust, and annoyance to the adjacent property holders would in such case be greater than under the present arrangement. Why, then, for a better method of transportation shall it be held liable? To this question no answer has been given but the dogmatic one already alluded to: "the Constitution so provides." But as the Constitution does not so provide, and as the plaintiff's contention has no support, either in statute or common law, we must refuse to entertain it.

The judgments are reversed, and a *venire facias de novo* in each case is awarded.

Mr. Justice Trunkey and Mr. Justice Sterrett dissent.

Pennsylvania Railroad Company *vs.* Hunter.

Opinion of Mr. Justice Gordon:—

June 1st, 1887. This cause was argued with other causes by same plaintiff in error *vs.* Lippincott, Church of the Covenant, and Sterner, and for reasons stated in the opinion already filed. Judgment reversed.

Mr. Justice Trunkey and Mr. Justice Sterrett dissent.

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No. 221. October Term, 1893.

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BRIEF OF DEFENDANT IN ERROR.

A. H. WINTERSTEEN,
WAYNE MacVEAGH,
For Defendant in Error.

Allen, Lane & Scott, Prs., Phila.

SUPREME COURT OF THE UNITED STATES.

Adeline B. Marchant, Administratrix, &c.,

vs.

Pennsylvania Railroad Company.

October Term, 1893.
No. 221.

BRIEF OF ARGUMENT OF DEFENDANT IN ERROR.

BRIEF ON THE MOTION TO DISMISS OR AFFIRM

The position of the plaintiff in error before this court is in some respects unique. It is based on the theory that under the Federal constitution this court may authoritatively establish for a State its local law in land damage cases, and may, on a writ of error to a State Supreme Court, overrule its interpretation of the State constitution as applied to such cases, and give to all citizens of the State remedies which the local legislature withholds.

Edward D. Marchant, the plaintiff in the court below, bought a house and lot on the north side of Filbert Street, Philadelphia, December 4th, 1871. (Record, page 13, folio 24.) There was at that time in force in the State of Pennsylvania, established by a long and unbroken series of decisions of its Supreme Court, interpreting the State constitution of 1790 as amended in 1838, a rule of property which limited the liability of corporations and others invested with the State's right of eminent domain to compensation for the taking of property, and excluded liability for injury to it. No recovery of damages could by any possibility be had by landowners, against corporations and others exercising without negligence the franchise of eminent domain under the general

law, unless there was a physical taking of property. Subject to this local rule of property, the plaintiff bought his land.

In 1874, several years after the plaintiff's title became vested in him, a new constitution went into effect in the State, which contained the provision that "municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements."

In 1881, the defendant in error, having previously bought land in fee along the south side of Filbert Street, in Philadelphia, fifty-one feet distant from the plaintiff's property, with the whole width of the street intervening, completed and put in operation an extension of its railroad on its own land. Many of the property-owners on the north side of the street, including the plaintiff, thereupon brought suit against the railroad company to recover damages for alleged injury to their lands, claimed to be due to the construction and operation of the railroad opposite. Four of the cases came before the Supreme Court of the State in 1887, and that tribunal, interpreting the new constitution, decided, after full argument, that there was no legal injury to property as contemplated in the constitution sustained by the respective claimants, and that the defendant was not liable in damages.

Penna. R. R. Co. vs. *Lippincott*, 116 Pa. St., 472.

It was decided that it was not intended by the constitutional provision to give to owners of property on one side of a highway, such as Filbert Street, a remedy in damages for depreciation in the value of their land incidentally due to the lawful and not negligent operation of the railway, on its own land, on the opposite side of the street; that under the long-settled law of Pennsylvania, as applied to individuals and corporations alike, such cases of loss were *damnum absque injuria;* and that the law remained unaltered by the new constitution as applied to the special facts.

The next year the present case, affirming the former ruling, was decided.

119 Pa. St., 541.

Exactly the same state of facts again came before the court in 1891, and its previous rulings were reaffirmed.

Dooner vs. *Penna. R. R. Co.*, 142 Pa. St., 36, 39.

And the law there laid down is now the settled law of the State, as since repeatedly declared and recognized.

Penna. S. V. R. Co. vs. *Walsh*, 124 Pa. St., 544, 558, 559;
Ryan vs. *P. R. R. Co.*, 132 Pa. St., 304, 307;
Jones vs. *Railroad Co.*, 151 Pa. St., 30, 47;
Penna. Co., &c., vs. *Railroad Co., Id.*, 334, 337;
Hauck vs. *Pipe Line Co.*, 153 Pa. St., 366, 374.

The plaintiff in error, administratrix of the plaintiff in the court below, now seeks to have the judgment of the Pennsylvania court reviewed in this court. It will be observed, it is an effort to secure the reversal by this court of a judgment rendered in a case involving the interpretation by the highest court of a State of the local law of the State, in a suit begun by one of its own citizens, who invoked that law in the State court, in respect to a claim of right relating to property wholly within the State's borders.

The Fourteenth Amendment, as usual, is called into service.

It is not alleged, nor can it be pretended, that the State of Pennsylvania has *passed any law* which deprives the plaintiff in error of her property without due process of law, or which denies her the equal protection of the laws. The provision of the new constitution of Pennsylvania, declaring that there should in certain classes of cases be liability for injury to or destruction of property, as well as for taking it, was *remedial* and not *restrictive* in its purpose and effect. It was designed to extend the rights and remedies of individuals theretofore existing, not to narrow them. No possible ground exists for asserting that the State, by this enactment of its people in the form of a constitution, in any way affected individual rights injuriously.

The argument in effect is, merely, that the Supreme Court of the State has so construed this remedial law as to exclude from its scope certain classes of cases, among which is the

plaintiff's, and that in some indefinite way this construction impairs the plaintiff's rights as guaranteed by the Federal constitution.

The position taken is not altogether a novel one, as might well be supposed, with the frequency with which, and the variety of circumstances under which, resort has been had to this tribunal for relief against decisions of State courts since the adoption of the Fourteenth Amendment. But the question raised is already foreclosed here. Said this court in a somewhat similar case, *De Saussure* vs. *Gaillard*, 127 U. S., 216, 232, 233, using language that may almost literally be applied to the facts of this case :—

"The Supreme Court (of the State) had already decided that the action of the plaintiff could not be sustained, according to the meaning of the provisions of the statute under which it was brought. The decision of that point was final, and was fatal to the plaintiff's right of recovery. The question is not a Federal question. It does not arise under the constitution of the United States, or of any law or treaty made in pursuance thereof. It is not a question which under this writ of error we have a right to review. We are not authorized to inquire into the grounds and reasons upon which the Supreme Court proceeded in its construction of that statute. *It is a statute conferring certain rights upon suitors choosing to avail themselves of its provisions upon certain conditions in certain cases. Who may sue under it, and when, and under what circumstances are questions for the exclusive determination of the State tribunals, whose judgment is not subject to review by this court.* It was competent for the State of South Carolina either to grant or withhold the right to bring suits against the officers of the State for the recovery of money alleged to have been illegally exacted and wrongfully paid.

* * * * * * *

"*In such cases, as the State may withhold all remedy, it may attach to the remedy it actually gives whatever conditions and limitations it chooses, and its own interpretation and application of its statutes on that subject, given by its own judicial tribunals, are conclusive upon the parties seeking the benefit of them.* No

right secured by the constitution of the United States to any citizen is affected by them unless they are framed or administered so as in some particular case to deprive the party of his property without due process of law, or to deprive him of the equal protection of the laws. No such question is or can be made in reference to the statute of South Carolina under consideration. It authorizes, in certain enumerated cases, parties found to be within its terms to bring a prescribed action against the State in the name of one of its officers. *According to the decision of the highest tribunal the plaintiff in this action is not within the class entitled to sue. To review that judgment is not within the province of this court, because it does not deny or injuriously affect any right claimed by the plaintiff under the constitution or laws of the United States.*"

There is absolutely no difference in principle between the position of the plaintiff in error in the above case and that of the plaintiff in error in the present case, and there is no difference in the facts, excepting that here a remedy is given for one, while there the remedy was given for another, class of injuries to property.

Under the decisions of this court, therefore, it is submitted that it is proper that the writ of error be dismissed, or, if there be a color of jurisdiction, that the judgment be affirmed under the rule, and a motion to dismiss or affirm has accordingly been made for that purpose.

There was no discussion before the Supreme Court of Pennsylvania of any Federal question, and the opinion of the court shows that no such question was considered by it. It is the settled law of this court that to give it jurisdiction of a writ of error to a State court, it must appear affirmatively not only that a Federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.

De Saussure vs. *Gaillard*, 127 U. S., 216, 234, and cases there cited;

Delaware City, &c., Nav. Co. vs. *Reybold*, 142 U. S., 636.

It is of course possible for the plaintiff in error to assert that the result of the judgment of the Supreme Court of Pennsylvania is to deprive her of her property without due process, or to deny to her the equal protection of the laws, and that the conclusion of the State court could only have been reached by deciding this claim adversely to her. But the same may be said by almost every litigant who has met with disappointment in a State court, and desires to invoke the jurisdiction of this court under the Fourteenth Amendment. The frequency with which cases are brought here involving Federal questions only colorably or argumentatively, has led to the adoption by the court of the practice of dismissing writs of error for want of jurisdiction, not only where no Federal question is involved, but also where the Federal question actually involved or raised must necessarily be resolved in favor of the defendant in error.

Yesler vs. *Washington Harbor Line Commissioners*, 146 U. S., 646, 657.

Under the precedent of Yesler's case it is believed there must be a dismissal of this writ, in view of the well-settled construction of the Fourteenth Amendment, under which the case has been brought into the court.

BRIEF ON THE MERITS.

The specifications of error and the argument based upon them assert three more or less distinct propositions, that under the judgment of the Supreme Court of Pennsylvania (1) her property has been taken for public use without just compensation; (2) she has been deprived of her property without due process of law; (3) she has been denied the equal protection of the laws.

The first of the above propositions, that the property of the plaintiff in error has been taken for public use without just compensation, if regarded as an independent one, does not raise a Federal question. The Fifth Amendment contains the only prohibition in the constitution against the taking of

property for public use without compensation, and this amendment, as is well known, operates exclusively in restriction of Federal power, and has no application to the States.

Thorington vs. *Montgomery*, 147 U. S., 490;
Davidson vs. *New Orleans*, 96 U. S., 97, 104;
Barron vs. *Baltimore*, 7 Pet., 243.

In the evolution of the thought of the court upon the Fourteenth Amendment it has been established that its inhibitions prevent the arbitrary deprivation of individual property by the States, and that a State law authorizing the taking of property for public use without compensation would be inimical to the Fourteenth Amendment as not due process of law.

See Mr. Justice Bradley's dissenting opinion in
Davidson vs. *New Orleans*, 96 U. S., 97, 107;
See also, *Kaukauna* vs. *Green Bay, &c., Canal*, 142 U. S., 254, 269;
Yesler's Case, 146 U. S., 646, 655.

The essential questions raised by the plaintiff in error are therefore reduced to the two suggested by the Fourteenth Amendment:—

I. Whether under the circumstances of this case there has been a taking of property without due process of law.

II. Whether the plaintiff in error has been denied the equal protection of the laws.

These will be considered in their order.

I.

THERE HAS BEEN NO TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

It must be insisted upon at the start, as an essential postulate of the case, that the point of time at which the rights of the plaintiff below are to be determined is December 4th, 1871, when he bought his land. No law, either in the form of a statute or of a constitution, has since been passed or adopted

by the State of Pennsylvania altering or affecting injuriously the plaintiff's rights as they then existed. The Supreme Court of Pennsylvania has decided that the constitution of 1874 did not alter the law, in respect to such situations as the present, from what it was before the constitution was adopted. That court has said in this case:—

"We adhere to the ruling in Railroad Company *vs.* Lippincott. * * * It was held in Railroad Company *vs.* Lippincott that the effect of this clause of the constitution was to place corporations upon the same plane with individuals as regards liability for injuries to property, and that it only made a corporation liable where an individual was liable at common law. * * * This brings us to the question whether in case a natural person were the owner of this road, and were operating it in the manner that the defendant company are now doing, he would be responsible to the plaintiff in damages. We answer this question in the negative."

Record, page 56, folio 92; page 57, folio 93; page 61, folio 101.

This court is obliged to follow this settled construction by the Pennylvania court of its constitution of 1874.

Mercer County vs. *Hacket*, 1 Wall., 83, 96;
Christy vs. *Pridgeon*, 4 Wall., 196, 203;
Township of Elmwood vs. *Marcy*, 92 U. S., 289;
State Railroad Tax Cases, Id., 575;
Anderson vs. *Santa Anna*, 116 U. S., 356, 365;
De Saussure vs. *Gaillard*, supra.

We have, therefore, to answer the question whether there was here a taking of the plaintiff's property without due process of law, with the rights of the parties determined by the law as it existed in 1871.

1. THERE WAS AT THAT TIME NO LIABILITY UNDER PENNSYLVANIA LAW FOR SUCH INJURIES TO PROPERTY AS ARE HERE ALLEGED.

The constitution then in force in the State (article IX., section 9) protected the individual against deprivation of his

property, "unless by the judgment of his peers or the law of the land." The tenth section of the same article declared: "Nor shall any man's property be taken or applied to public use without the consent of his representatives and without just compensation being made." These provisions were continuously part of the fundamental law of the State from 1790 to January 1st, 1874, a period of eighty-four years. The uniform and unvarying construction by the Supreme Court of the State of these guarantees of individual rights, during all that period, as applied to facts like the present, was that they did not afford protection against injuries sustained by a property-owner consequent upon the exercise by a corporation of the right of eminent domain, unless his property was physically taken.

The court established this construction as early as 1840, in the case of *The Philadelphia and Trenton Railroad Company*, 6 Whart., 25, 46, and applied it to the case of a railroad, occupying a public highway longitudinally under State authority. It was declared not to be liable in damages for consequential injuries to abutting property-owners.

Three years afterwards, in *Monongahela Navigation Company* vs. *Coons*, 6 W & S., 101, 113, Chief Justice Gibson elaborated the doctrine, and applied it to a claim by a mill-owner against a navigation company for injury to his mill consequent upon the building of a dam under State authority. The court said:—

"It is contended, however, not so much that the power of the legislature falls short of a case like the present, as that it can be exerted only on the basis of compensation made or secured; and that for damage done by the authority of the State there is, in every case without it, redress by action; in other words, that the authority is void. We must not forget, however, that the State is a sovereign who cannot be sued against her consent; and that there are no other limitations to her power over private property than those that are placed upon it by the constitution. What are they? 'No person shall for the same offense be twice put in jeopardy of life or limb; nor shall any man's property be taken or applied to public use without the consent of his representatives, and

without just compensation being given.' Again: 'In all criminal prosecutions the accused hath a right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or information a speedy trial by an impartial jury of the vicinage. He cannot be compelled to give evidence against himself, nor can he be *deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land.*' Now, it cannot be said that the plaintiff's mill was taken or applied in any legitimate sense by the State or by the company invested with its power; nor can it be said that he was deprived of it. In the case of The Philadelphia and Trenton Railroad (6 Whart., 25) the words in the first paragraph were allowed to have their obvious and popular meaning, so as to be restrained to property taken away, and not extended to property injured by an act which did not amount to an assumption of the possession; and the same rule of interpretation would give the same meaning to the word 'deprived' in the second. * * * If, then, the State would not be bound to pay for the damage done to the plaintiff's mill, had she been the immediate cause of it, how is the defendant bound? The company acted by her authority, as well as for the public benefit, and, consequently, with no greater responsibility than is imposed by the constitution, which, it must be admitted, has narrowed the protection that the delegation of her power would otherwise have afforded."

In 1844, in *Henry* vs. *Pittsburgh and Allegheny Bridge Co.*, 8 W. & S., it was again said: "Neither the State nor a person, artificial or natural, acting by its authority, under a law which the legislature is competent to make, is answerable for consequential damages occasioned by the construction of a highway further than is specially provided by the law itself."

These principles were reaffirmed in 1851, in *O'Connor* vs. *Pittsburgh*, 18 Penna. St., 187, and applied to a municipal corporation, and again in 1853, in *Sharpless* vs. *Mayor of Philadelphia*, 21 Penna. St., 147, 166, 167.

It was declared in 1859, in *New York & Erie R. R. Co.* vs. *Young*, 33 Penna. St., 175, 180, 181, to be "the settled law of the land, if anything can be settled, that unless the act of incorporation provides for it, consequential damages are not recoverable from a railroad or other improvement company in constructing or maintaining their works."

Said the court again, in *Watson* vs. *Pittsburgh & Connellsville R. R. Co.* (1860), 37 Penna. St., 469, 479: "The constitutional provision which requires that just compensation should be made, or adequate security given therefor, before private property may be taken for public use by any corporate body or individual, has always been held to contemplate only an actual appropriation. Matters of annoyance, indirect and consequential injuries to property, and acts tending to depreciate the value, but which do not amount to a real 'taking,' are outside of the provision." The succeeding year the doctrine was again recognized. *Buckwalter* vs. *Black Rock Bridge Company*, 38 Penna. St., 281.

The case of *Cleveland and Pittsburgh R. R. Co.* vs. *Speer*, 56 Penna. St., 325, came before the Supreme Court in 1867. It was specifically decided in definite terms that an action could not be maintained by a citizen for injury to his property from noise, smoke, and stench of locomotives and trains, arising from the location of railroad switches and side tracks near his house. Said the court (page 334): "No action at common law will lie for one who has sustained a private injury by the execution of legal powers exercised judiciously and carefully. * * * Another form of stating the same principle is to be found in the cases of this State, wherein it is said that canal and railway companies are not liable for consequential damages in the exercise of the power of eminent domain under the authority of the State." The same doctrine was reasserted in 1870 in *Spangler's Appeal*, 64 Penna. St., 387, 394.

In 1871, the very year the plaintiff bought his property, the court reviewed its previous decisions and reaffirmed them. *West Branch and Susquehanna Canal Co.* vs. *Mulliner*, 68 Penna. St., 357. The significance of the decision upon the facts

involved, by reason of their close analogy to those of the present case, is to be noted. The action was against a canal company which had bought a State canal, for consequential damages resulting from the exercise of the franchises bought. It was held that the State was not liable for such damages, and that the State's alienee was not liable, there being no provision made to that effect in the Act transferring the canal. In the present case the Pennsylvania Railroad Company was the purchaser of the State's railroad between Columbia and Philadelphia, and built its Filbert Street extension under the powers conferred by the Act authorizing the purchase.

Pennsylvania R. R. Co. vs. *Duncan*, 111 Penna. St., 352, 361;

Pennsylvania R. R. Co. vs. *Miller*, 132 U. S., 75, 79.

It was therefore in an exactly similar position to that of the canal company whose liabilities were considered in *West Branch and Susquehanna Canal Co.* vs. *Mulliner*, and the plaintiff took title to his property in 1871, therefore, with established law freshly reiterated, showing the limitations of his rights in just such a case as the present.

Again in 1878, after the plaintiff's title became vested in him, the Supreme Court of Pennsylvania, referring to the law as it stood prior to 1874, and to those corporations not affected by the constitution of that year, said: "There is no principle of law better settled in Pennsylvania than that a common-law action does not lie against a corporation for consequential injuries occasioned by the construction and operation of its works." *Struthers* vs. *Dunkirk, &c., Ry. Co.*, 87 Penna. St., 282, 285.

In *Lycoming Gas & Water Company* vs. *Moyer* (1882), 99 Pa. St., 615, 619, it was said: "It is not open to debate that, prior to the constitution of Pennsylvania, neither the Commonwealth nor its *locum tenens* was liable for consequential damages resulting from the exercise of the right of eminent domain. The later cases in which the law of Pennsylvania, as it was in 1871 and prior thereto, is similarly stated, need not be cited. They are too numerous even for reference.

It is sufficient to say that there is nothing better understood in Pennsylvania, as declared by its court of last resort for over

half century, than that until 1874 no right of action for injuries such as are here complained of, existed under the guarantees of individual rights then existing in the State constitution. These guarantees are practically the same in kind and meaning as, and almost identical in form with, those contained in the Fifth and Fourteenth Amendments of the Federal constitution now invoked.

Davidson vs. *New Orleans*, 96 U. S., 97, 101.

2. THIS COURT IS REQUIRED BY ITS OWN DECISIONS TO RECOGNIZE AND ENFORCE THE ABOVE LAW OF PENNSYLVANIA AS IT EXISTED IN THAT STATE IN 1871.

The law of Pennsylvania which excludes liability for damages to property, no portion of which was taken, was a rule of property in the State, subject to which, when once established, titles to real estate were taken. It was the local or common law of the State binding upon all.

Now, even were the present case in this court upon a writ of error to a Circuit Court of the United States sitting in Pennsylvania, with jurisdiction resting solely upon difference in citizenship of the parties, the court would be bound by the local law of Pennsylvania. It is all the more bound in a case brought here on a writ of error to the Supreme Court of the State by a citizen of the State.

The decisions of this court bearing upon the question are all to the same effect. It was said in *Town of South Ottawa* vs. *Perkins*, 94 U. S., 260, 267: "This court has always held that the laws of the States are to receive their authoritative construction from the State courts, except when the Federal constitution and laws are concerned; and the State constitutions, in like manner, are to be construed as the State courts construe them. This has been so often laid down as the proper rule, and is in itself so obviously correct, that it is unnecessary to refer to the authorities."

In *Burgess* vs. *Seligman*, 107 U. S., 20, 33: "*Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain*

rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true in regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is." To the same effect is the language of the court in *Pana* vs. *Bowler*, 107 U. S., 529, 540.

In *Carroll County* vs. *Smith*, 111 U. S., 556, 563, it was declared that a rule of local law previously established so as to become recognized as settled law was one which all parties to transactions afterwards entered into would be presumed to know and to conform to, and which this court would be obliged to recognize.

It was observed by Mr. Justice Miller in *Bucher* vs. *Cheshire Railroad Co.*, 125 U. S., 555, 582, speaking of the section of the Judiciary Act relative to trials at common law in the courts of the United States: "It has been held by this court that the decisions of the highest court of a State in regard to the validity or meaning of the constitution of that State, or its statutes, are to be considered as the law of that State, within the requirement of this section. In Leffingwell *vs.* Warren, 2 Black, 599, this court said, in regard to the statutes of limitations of a State: 'The construction given to a statute of a State by the highest tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text.' In the case of Luther *vs.* Borden, 7 How., 1, 40, Chief Justice Taney said: 'The point then raised here has been already decided by the courts of Rhode Island. The question related altogether to the constitution and laws of that State; and the well-settled rule in this court is, that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State.' See also Post *vs.* Supervisors, 105 U. S., 667.

"It is also well settled that where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the State, by

which is meant those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto, they are to be treated as laws of that State by the Federal courts. * * * There is no common law of the United States, and yet the main body of the rights of the people of this country rest upon and are governed by principles derived from the common law of England, and established as the laws of the different States. Each State of the Union may have its local usages, customs, and common law. Wheaton *vs.* Peters, 8 Pet., 591; Pennsylvania *vs.* Wheeling Bridge Co., 13 How., 519.

"When, therefore, in an ordinary trial in an action at law we speak of the common law, we refer to the law of the State as it has been adopted by statute or recognized by the courts as the foundation of legal rights. It is in regard to decisions made by the State courts in reference to this law, and defining what is the law of the State as modified by the opinions of its own courts, by the statutes of the State, and the customs and habits of the people, that the trouble arises.

"It may be said generally that wherever the decisions of the State courts relate to some law of a local character, which may have become established by those courts, or has always been a part of the law of the State, that the decisions upon the subject are unusually conclusive, and always entitled to the highest respect of the Federal courts. The whole of this subject has recently been very ably reviewed in the case of Burgess *vs.* Seligman, 107 U. S., 20. Where such local law or custom has been established by repeated decisions of the highest courts of a State it becomes also the law governing the courts of the United States sitting in that State."

See also—

Bacon vs. *Northwestern Mut. Life Ins. Co.*, 131 U. S., 258, 264;
Gormley vs. *Clark*, 134 U. S., 338, 348;
Randolph vs. *Quidnick Co.*, 457, 463;
South Branch Lumber Co. vs. *Ott*, 142 U. S., 622, 628.

It is perfectly well settled that State decisions upon local laws have the same binding force when before this court for

review upon writs of error to State courts, as when used as precedents in Federal courts sitting in the States.

Jefferson Branch Bank vs. *Skelly*, 1 Black, 436;
Butz vs. *City of Muscatine*, 8 Wall., 575, 582.

Said the court in the latter case:—

"In all the cases brought here under the twenty-fifth section of the Judiciary Act, this court has never hesitated to determine for itself the construction and effect of any statute of a State brought under review, without reference to the previous adjudications of the highest court of the State upon the subject. In the opinion delivered in the case of the Jefferson Branch of the State Bank of Ohio *vs.* Skelly, it was well asked of what value would the appellate power of this court be to the party aggrieved if such were not the rule. In that case, and in all the other cases brought here involving the same question, an Act of the Legislature of Ohio was pronounced invalid, and the judgments of the Supreme Court of the State were reversed. Cases may be brought here from the Circuit Court of such a character that it is necessary to the right administration of justice that we should proceed upon the same principle in deciding them. Indeed, questions which are identical may be brought here in both ways. Under such circumstances it will hardly be insisted that State adjudications are to control in one case and not in the other. Our duty depends upon the questions involved and not upon the channel through which the case comes before us. *Where the settled decisions in relation to a statute, local in its character, have become rules of property, these remarks have no application. In such cases this court will, as it always has done, follow such adjudications.*"

3. UNDER THE LAW OF THIS COURT, INDEPENDENTLY OF THE LAW OF PENNSYLVANIA, THERE WAS NO TAKING OF THE PLAINTIFF'S PROPERTY WITHIN THE INTENDMENT OF THE FOURTEENTH AMENDMENT.

When the necessity for a judicial construction of the Fourteenth Amendment first presented itself to the court in the

Slaughter-house Cases, it was observed by Mr. Justice Miller that the protection against deprivation of property without due process of law "has been in the constitution since the adoption of the Fifth Amendment as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States, as a restraint upon the power of the States. *This law, then, has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over the States in this matter in the hands of the Federal government.*"

It has been seen at length under the Pennsylvania constitution, as construed by its Supreme Court, that the effect upon the plaintiff's property such as is here involved did not constitute a "taking" within the intendment of the instrument.

The same construction of the word has been independently made by this court when called upon to interpret provisions of the kind in the Federal and State constitutions.

> *Smith* vs. *Corporation of Washington*, 20 How., 135;
> *Transportation Co.* vs. *Chicago*, 99 U. S., 635, 641, 642;
> *Chicago* vs. *Taylor*, 128 U. S., 161.

It is sufficient to quote briefly from the opinion of the court in *Transportation Co.* vs. *Chicago*, at page 641, to see how fully the doctrine is established here:—

"In making the improvement of which the plaintiffs complained the city was the agent of the State and performing a public duty imposed upon it by the legislature, and that persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction and with care and skill, is a doctrine almost universally accepted alike in England and this country. * * * The doctrine, however it may at times appear to be at variance with natural justice, rests upon the soundest legal reason. The State holds its highways in trust for the public. Improvements made by its direction or by its authority are its acts, and the ultimate responsibility, of

course, should rest upon it. But it is the prerogative of the State to be exempt from coercion by suit, except by its own consent. This prerogative would amount to nothing if it does not protect the agents for improving highways which the State is compelled to employ. The remedy, therefore, for a consequential injury resulting from the State's action through its agents, if there be any, must be that, and that only, which the legislature shall give. It does not exist at common law. The decisions to which we have referred were made in view of Magna Charta and the restrictions to be found in the constitution of every State, that private property shall not be taken for public use without just compensation being made. *But acts done in the proper exercise of governmental power, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority.* * * * The extremest qualification of the doctrine is to be found, perhaps, in Pumpelly *vs.* Green Bay Company, 13 Wall., 166, and in Eaton *vs.* Boston, Concord & Montreal Railroad Co., 51 N. H., 504. In those cases it was held that permanent flooding of private property may be regarded as a "taking." In those cases there was physical invasion of the real estate of the private owner, and a practical ouster of his possession. *But in the present case there was no such invasion. No entry was made upon the plaintiff's lot.*" This language was quoted at length with approval by the court as late as 1888 in *Chicago* vs. *Taylor.*

The doctrine of the case was also recognized in the case of *Baltimore & Potomac R. R. Co.* vs. *Fifth Baptist Church*, 108 U. S., 317, 331, where indeed no constitutional question was raised, but where the protection of the Fifih Amendment would undoubtedly have been applied had it had any application whatever. It was there held that legislative authority to a railroad company to bring its tracks within municipal limits and to construct shops and engine-house there did not con-

fer upon it authority to erect noisy workshops in the immediate vicinity of a church where services had been held several times during the week for a number of years before the erection of the shops. But the court distinguished the case in hand from that of a railway operating its line in a city with due care. Said Mr. Justice Field for the court (page 331): "*Undoubtedly a railway over the public highways of the District, including the streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by the cars with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is* damnum absque injuria. *The private inconvenience in such case must be suffered for the public accommodation.*"

See also generally, *Cumberland Telephone, &c., Co.* vs. *United Electric Ry. Co.*, 42 Fed. Rep., 273, 278–283.

It thus appearing by a concensus of opinion both of this court and the Supreme Court of Pennsylvania, whose judgment is here in review, that there was no "taking" of property, it will be unnecessary to consider the meaning of the phrase "due process of law," as applied to the case.

For unless there is a *taking* of property without due process of law, or a *taking* of property for public use, no constitutional question under this head arises.

This case is merely another illustration of the remark of Mr. Justice Miller in *Davidson* vs. *New Orleans*, as quoted with approval by Mr. Justice Field in *Missouri Pacific Ry. Co.* vs. *Humes*, 115 U. S., 512, 519: "There is abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. It would seem * * * that the clause under consideration

is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court, of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded."

But even were we to assume, for the argument's sake, that there was a taking of property, under no possible authoritative construction of the words could it be maintained that the taking was without due process of law.

A few of the recent definitions of the phrase will show this :—

"In the Fourteenth Amendment due process of law refers to that law of the land in each State which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all civil and political constitutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure. The fundamental principles referred to, within which the State's power must be exercised, exclude arbitrary or despotic legislation, acts of local or special application and enforceable without judicial process. It (the legislative act) must not be a special rule for a particular process or a particular case, but, in the language of Mr. Webster in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society,' and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary execution of powers under the forms of legislation."

Hurtado vs. *California*, 110 U. S., 516, 535;
Missouri Pacific Railway Co. vs. *Humes*.

"By 'due process' is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for security of private rights."

Hagar vs. *Reclamation District*, 111 U. S., 701, 708;
Missouri Pacific Railway Co. vs. *Humes.*

"Law in its regular course of administration through courts of justice is due process, and when secured by the law of the State, the constitutional requisition is satisfied. (2 Kent Comm., 13.) And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the power of the government, unrestrained by the established principles of private right and distributive justice."

Caldwell vs *Texas*, 137 U. S., 692, 697;
Leeper vs. *Texas*, 139 U. S., 462;
Giozza vs. *Tiernan*, 148 U. S., 657, 662.

With careful considerations by the Court of Common Pleas of Philadelphia, and by the Supreme Court of Pennsylvania, of the merits of the plaintiff's claim, after a full and impartial trial of the issues, strictly according to the course of the common law, and with a determination finally made against him, not only involving, in the process through which it was reached, no element of arbitrary action, but with the conclusion rendered absolutely necessary by the well-settled principles of the law laid down by this court and by the Pennsylvania courts, *subject to which law he took title to his property*, it is

little less than presumption for the argument to be made in this forum, that there was here a taking of property without due process of law.

II.

THERE HAS BEEN NO DENIAL OF THE EQUAL PROTECTION OF THE LAWS.

The construction of the State constitution of 1874 by the Supreme Court of Pennsylvania, as heretofore stated, is that it conferred upon property-owners rights of action against corporations and others invested with the State's right of eminent domain, where damage to property is sustained in one class of cases, and that it did not confer rights of action for damage in another and different class of cases. The decision of the court is that where the damage to property is due, in the language of the constitution, to the *construction or enlargement* of the works, highways, or improvements of a corporation or other person, there is within the intent and meaning of the instrument, and in the eye of the law, a resulting injury for which compensation must be made; that on the other hand, where the damage to property is alone traceable *not to the construction or enlargement of the works, highways, or improvements, but to their operation when completed*, there is no resulting legal injury for which a right of action exists. It has illustrated the difference between these two classes of situations by its conclusions in these Filbert Street extension cases. This extension crosses the Schuylkill River from West Philadelphia at a point north of Market Street, and east of that river intersects the streets extending north and south, from Twenty-third Street to Broad Street, where it terminates. From the river to a point between Twenty-first and Twentieth Street the railroad is constructed over the cartway of Filbert Street, and is supported by iron pillars inside the curb line of the street. The railing or guard along the track, ac-

cording to the facts established in Duncan's case (P. R. R. *vs.* Miller, 132 U. S., 75, 77), comes within one or two feet of the buildings on the north side of the street. Between Twenty-first and Twentieth Streets the railroad structure trends to the south, and from Twentieth Street extends eastward six squares or blocks, upon substantial stone foundations built wholly upon the defendant's own property on the south side of the street, with the whole width of the street, fifty-one feet, intervening between the structure and the properties on the north side of the street. (Record, page 13, folio 23.) The plaintiff's property is between Seventeenth and Eighteenth Streets, opposite the latter-described portion of the railroad structure.

(A rough diagram will show the general situation.)

The properties on the north side of Filbert Street, from Twentieth Street westward to the river, were all, as matter of fact, physically damaged by the construction of the railroad, in having access to them impeded and their light and air obscured and interfered with.

Record, page 58, folio 96;
Penna. R. R. Co. vs. *Lippincott*, 116 Penna. St., 472, 483;
Penna. R. R. Co. vs. *Magee*, 136 U. S., 646.

The properties on the north side of Filbert Street east of Twentieth Street were in no respect damaged by the construction of the railroad. In the actions brought by owners of property there situated, including that of the plaintiff, it was alleged that injury was sustained by the *construction and operation* of the railway, but the proof tended no further than to establish depreciation in value due to the *operation* of the railroad.

As was said by the Supreme Court of Pennsylvania, in *Penna. R. R. Co.* vs. *Lippincott*, 116 Penna. St., 481: "It is not alleged that any injury has resulted from the erection of the elevated railway, *nor, indeed, could it truthfully be so alleged*, for the erection is on the defendant's own ground, on

the south side of the street, which street is some fifty-one feet wide, so that no part of the plaintiff's property, or any right of way, or other appurtenance thereunto belonging, has been taken or used in the erection or construction of said viaduct. The damage complained of results wholly from the manner in which the roadway is used; results from the noise, smoke, and dirt arising from the engines and cars; the necessary consequence of the use of the property as a steam railway."

The Supreme Court of Pennsylvania, interpreting the constitution of the State with reference to these two distinct classes of situations, has held that the constitution gives rights of action to owners of property situated, as in Duncan's case, at Twenty-third Street and Filbert Street, and as in Magee's case, near Twenty-first Street and Filbert Street; and gives no right of action to owners of property situated as in this case and in Lippincott's, Church of the Covenant's, Sterner's, Hunter's, and Dooner's cases.

See 116 Pa. St., 472; 142 Pa. St., 36.

It is now gravely argued that this distinction in the application of the constitution of Pennsylvania to wholly different situations is a denial to the plaintiff of the equal protection of the laws.

It is submitted that this proposition is made in deliberate disregard of the meaning of "equal protection of the laws," as established by this court. It is well known that the provision in the Fourteenth Amendment in question was adopted, as indeed the whole of the Amendment itself was devised, for the purpose of preserving the rights of individuals and classes of individuals, in like situations, against arbitrary discriminations.

See Slaughter-house Cases.

It has never been seriously supposed, and if supposed no utterance of this court can be found to warrant the supposition, that, under this Amendment, a State must give the same relief to all persons claiming redress under a particular law,

no matter how differently they may stand to each other and to the law, or that a State may not grant relief under one set of circumstances, and withhold it altogether in another and wholly different set of circumstances. Said the court in *Missouri* vs. *Lewis*, 101 U. S., 22, 31, the clause in question means "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes *in the same place and under like circumstances*. Again, in *Hayes* vs. *Missouri*, 120 U. S., 68, 71: "The Fourteenth Amendment to the constitution of the United States does not prohibit legislation which is limited either in the object to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, *under like circumstances and conditions*, both in the privileges conferred and in the liabilities imposed. As we said in Barbier *vs.* Connolly, speaking of the Fourteenth Amendment, class legislation, discriminating against some and favoring others, is prohibited; *but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated*, is not within the amendment."

113 U. S., 27, 32.

And in *Missouri Pacific Ry. Co.* vs. *Mackey*, 127 U. S., 205, 209, referring to a law which imposed upon railway companies a liability for injuries resulting from the negligence of co-employés, the court observed: "*The objection that the law of 1874 deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application.* Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and

laws for the irrigation and drainage of particular lands, for the construction of levees and the bridging of navigable rivers, are instances of this kind. Such legislation does not infringe upon the clause of the Fourteenth Amendment requiring equal protection of the laws, because it is special in its character; if in conflict at all with that clause, it must be on other grounds. And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, *if all persons brought under its influence are treated alike under the same conditions.* A law giving to mechanics a lien on buildings constructed or repaired by them, for the amount of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, separating them from land of adjoining proprietors, so as to keep cattle off their tracks, are instances of this kind. *Such legislation is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed.*"

See also—

Missouri Pacific Ry. Co. vs. *Humes;*
Home Ins. Co. vs. *New York*, 134 U. S., 594, 606;
Pacific Express Co. vs. *Seibert*, 142 U. S., 339, 354.

The contention of the plaintiff in error is, in effect, that she has been denied the equal protection of the laws merely because the people of the State of Pennsylvania saw fit to amend their constitution in such a way that other owners of property on Filbert Street, differently situated from herself in relation to the defendant's railroad subsequently built in the neighborhood, have been held by the Supreme Court of the State, construing the constitution, to be within its remedial provisions, while she herself has been held, in respect to her property, not to be within those provisions.

In most, if not all of the cases where the contention has been made in this court that there was, in any specific instance,

a denial of the equal protection of the laws, it has been possible to point to a new burden or a new disability imposed upon or enforced against the party objecting, or to a previously existing right of which he has been deprived. It has remained for the plaintiff in error to announce the theory that, when the laws of a State confer upon owners of property a remedy for certain kinds of injuries, and without imposing burdens or disabilities upon owners of other property differently situated, and without depriving them of any rights theretofore enjoyed, merely limit the scope of the remedy conferred to properties having different physical situations from their own, with respect to a work of public improvement built in exercise of the right of eminent domain, there is a denial of the equal protection of the laws to those owners who are outside the area of the remedy.

The one sufficient objection to the theory, if there were no other, is, that under it the Federal guarantee of equal protection of the laws, instead of being a pledge to the citizen of equal rights before the law, as those rights are well understood, would become a mere procustean machine operative upon State legislation, reducing it to a dead level of uniformity, irrespective of differences in situation, and working counter to that principle of local self-government in the United States which the Federal constitution and laws, no less than the people themselves, are careful to guard.

A. H. WINTERSTEEN,
WAYNE MACVEAGH,
For Defendant in Error.

Office Supreme Court U. S.
FILED.
JAN 18 1894
JAMES H. McKENNEY,
CLERK.

153-380

No. 221. October Term, 1893.

Supreme Court of the United States.

MARCHANT'S ADMINISTRATRIX

vs.

PENNSYLVANIA RAILROAD COMPANY.

M. HAMPTON TODD,
Pro Plaintiff.

Allen, Lane & Scott, Prs., Phila.

SUPREME COURT OF THE UNITED STATES.

Marchant's Administratrix
vs.
Pennsylvania Railroad Company.

October Term, 1893.
No. 221.

REPLY.

The defendant has misapprehended our position.

We have not the slightest desire to call in question the long and unbroken line of authorities in this court which hold that the rulings of the highest tribunal in the State in construction of its own Constitution and statutes in which no Federal question is involved are binding on this court. The case cited by the defendant, *De Saussure* vs. *Gaillard*, 127 U. S., 216, is as good an illustration of the rule as any of the many others that might have been cited.

The difference between that class of cases and the principles ruled in *Head* vs. *Amoskeag Manufacturing Company*, cited in our brief and relied upon, is that in the one the State court is supreme, while in the other the State court is subject to review in this court.

What we contend for and endeavor to sustain in our brief is this, that where the State or its delegated agent in the exercise of the power of eminent domain, for the purpose of a public work deprives a citizen of his property by depreciating its value by agencies which at common law would have sustained an action between private individuals, and denies to the citizen thus injured a remedy to obtain compensation therefor, such State deprives a citizen of his property without due process of law.

The only question that is open for discussion, as we think, is, What is a deprivation of property within the meaning of the Constitution? It is not defined. We therefore must resort to general principles for a definition.

In some of the States of the Union similar phrases have received much broader construction than in others. Chief Justice Gibson is responsible in Pennsylvania for the adoption of the narrow rule of constitutional interpretation, and we think his view arose from a misconception of the purpose and object of constitutional guarantees. He looked upon them as restrictive of sovereign power and authority, and therefore to be strictly construed as being derogatory of the sovereign right His method of reasoning would seem to have been that sovereignty was despotic; that it could do anything which it was not forbidden to do; and that in ascertaining what was forbidden you must construe the limitation strictly, and he carried this view to the extent of holding that it was in the power of the sovereign to take *private property for private use.*

In *Harvey* vs. *Thomas*, 10 Watts Rep., 63, which was an action arising out of an Act of Assembly authorizing the construction of lateral railroads to connect private property with public improvements Chief Justice Gibson, delivering the opinion of the court, says (page 66):—

"The most material point in the cause is that which involves "the constitutionality of the statute on which the defendant's "right is founded, but it is one about which little need be said. "If there is an appearance of solidity in any part of the argu- "ment, *it is that the legislature have not power to authorize "application of another's property to a private purpose, even on "compensation made, because there is no express constitutional "affirmance of such a power. But who can point out an express "constitutional disaffirmance of it?* The clause by which it is "declared that no man's property shall be taken or applied to "public use without the consent of his representatives, and "without just compensation made, is a disabling, not an "abling one; AND THE RIGHT WOULD HAVE EXISTED IN FULL "FORCE WITHOUT IT. Whether the power was only partially "restrained for a reason similar to that which induced an ancient

"lawgiver to annex no penalty to parricide, *or whether it was "thought there would be no temptation to the act of taking the "property of an individual for another's use, it seems that there "is nothing in the Constitution to prevent it;* and the practice of "the legislature has been in accordance with the principle, of "which the application of another's ground to the purpose of "a private way is a pregnant proof. It is true that the title "of the owner is not divested by it, but, in the language of "the Constitution, the ground is nevertheless 'applied' to "private use. *It is also true that it has usually, perhaps "always, been so applied on compensation made; but this "has been done from a sense of justice and not of constitutional "obligation.* But as in the case of the statute for compromising "the dispute with the Connecticut claimants, under which the "property of one man was taken from him and given to "another, for the sake of peace, the end to be attained by this "lateral railroad law is the public prosperity. Pennsylvania "has an incalculable interest in her coal mines; nor will it be "alleged that the incorporation of railroad companies, for the "development of her resources, in this or any other particular, "would not be a measure of public utility; and it surely will "not be imagined that a privilege constitutionally given to an "artificial person would be less constitutionally given to a "natural one."

In *Monongahela Nav. Co.* vs. *Coons*, 6 W. & S., 101, which was an action by a mill-owner for backing water on his mill-wheel by the erection of a dam under authority of the State, Judge Gibson, perhaps for the first time in Pennsylvania, held, that property was not taken when injured by "an act "which did not amount to an assumption of the possession," nor was the owner "deprived" of it by such act. In short, if the State, or its agent, did not *use* the property, injured there was no taking or deprivation, and, while recognizing that such injuries would have sustained an action at common law, either by an assize of novel disseisin or assize of nuisance, at the election of the party injured, he dismissed the whole subject without discussion in the curt phrase that "we are not to sup-"pose that the framers of the Constitution meant to entangle

"their meaning in the mazes of the *jus antiquum*." If the agent of the State took one's hat, and appropriated it to his own use by wearing it, he was liable to make compensation, but if he knocked it off and tramped on it, and rendered it valueless, he was not liable, because that did not amount to "an assumption of the possession." Although it was an injurious act, yet it was of no use or benefit to him, and therefore he need not pay, and any one who seeks to make him is to be told that to do so is to entangle the meaning of the Constitution in the mazes of the ancient law. It is quite an old law, and a respectable one, which says, "*Thou shalt not* "*steal*," and it is certainly within the code of morals embraced in that law that a State shall not deprive any of its citizens of their property without just compensation.

In Monongahela Nav. Co. *vs.* Coons, *supra*, Judge Gibson, page 113, says:—

"It is contended, however, not so much that the power of "the legislature falls short of a case like the present as that "it can be exerted only on the basis of compensation made "or secured, and that for damage done by the authority of "the State there is, in every case without it, redress by "action; in other words, that the authority is void. We "must not forget, however, that the State is a sovereign who "cannot be sued against her consent, and that there are no "other limitations to her power over private property than "those that are placed upon it by the Constitution. What "are they? 'No person shall, for the same offense, be twice "'put in jeopardy of life or limb; nor shall any man's prop-"'erty be taken or applied to public use without the consent "'of his representatives, and without just compensation being "'given.' Again, 'in all criminal prosecutions the accused "'hath a right to be heard by himself and his counsel; to "'demand the nature and cause of the accusation against him; "'to meet the witnesses face to face; to have compulsory pro-"'cess for obtaining witnesses in his favor, and, in prosecu-"'tions by indictment or information, a speedy trial by an "'impartial jury of the vicinage. He cannot be compelled "'to give evidence against himself, nor can he be deprived

"'of his life, liberty, or property unless by the judgment "'of his peers or the law of the land.' *Now it cannot be "said that the plaintiff's mill was taken or applied, in any "legitimate sense, by the State or by the company invested "with its power, nor can it be said that he was deprived "of it.* In the case of The Philadelphia and Trenton Rail-"road (6 Whart., 25), the words in the first paragraph were "allowed to have their obvious and popular meaning, so as to "be restrained to property *taken away, and not extended to "property injured by an act which did not amount to an assump-"tion of the possession; and the same rule of interpretation "would give the same meaning to the word 'deprived,' in the "second. It is true, that a nuisance by flooding a man's land was "originally considered so far a species of ouster, that he might have "had remedy for it by assize of novel disseisin or assize of nui-"sance, at his election; but we are not to suppose that the framers "of the Constitution meant to entangle their meaning in the mazes "of the jus antiquum.* * * * Words, therefore, which do "not of themselves denote that they are used in a technical "sense, are to have their plain, popular, obvious, and natural "meaning; and, applying this rule to the context of the Con-"stitution, we have no difficulty in saying that the State is not "bound beyond her will to pay for property which she has not "taken to herself for the public use. * * * Page 115: It is "not, therefore, enough to set before us a case of moral wrong, "without showing us that we have legal power to redress it. "Beyond constitutional restraint or legislative power, there is "none but the legislative will, tempered by its sense of jus-"tice, which has happily been sufficient, in most cases, to "protect the citizen. Compensation has been provided for "every injury which could be foreseen, whether within the "constitutional injunction or not, in all laws for public works "by the State or a corporation; though cases of damage have "occurred which could neither be anticipated nor brought "within the benefit of the provision by the most strained con-"struction. In one instance, a profitable ferry on the Susque-"hanna, at its confluence with the Juniata, was destroyed by "the Pennsylvania Canal; and, in another, an invaluable

"spring of water, at the margin of the river, near Selinsgrove, "was drowned. These losses, like casualties in the prosecu- "tion of every public work, are accidental but unavoidable; "and they are but samples of a multitude of others; so that "the plaintiffs have at least the miserable good luck to know "that they have companions in misfortune; would that it "were in our power to afford them more solid consolation."

What is property and what amounts to a deprivation of it is discussed at length by Judge Hare in his work *on American Constitutional Law*, and he supports his text by numerous citations, some few of which we refer to as sufficiently illustrating the principles he seeks to establish and we rely upon.

At page 357 of his above-mentioned work he says:—

"The term property may be used to signify the thing "owned or possessed, or the right and privileges which to- "gether make up the aggregate of use or enjoyment implied "in ownership. Property may therefore justly be defined as "'the dominion or indefinite right of user or disposition "'which one may exercise over particular things or subjects.' "This is its appropriate meaning, and that which it has in "the Constitution; although it is not infrequently used to "indicate the thing rather than the right, and much of the "uncertainty and confusion observable in the decisions have "arisen from overlooking this distinction.

"Such, manifestly, is the true interpretation of the Federal "Constitution, because the same amendment which guaran- "tees the right to compensation where property is taken for "public purposes provides that no person shall be deprived "of life, liberty, or property without due process of law. A "man who is precluded from exercising his right over or to "a thing is obviously deprived of his property in the thing, "and the term presumably has the same meaning throughout "the clause; or to state the case somewhat differently, *the "intention was to forbid the abrogation of private rights abso- "lutely for private purposes and relatively for public purposes, "and that which would be a deprivation if done for a private "use must be attended with compensation, though done for a "public end, and will be unconstitutional unless the condition is "observed.*"

Page 383 :—

"The answer to the first inquiry, What is property? is "virtually a response to the second, What is the taking that "may not occur without compensation? For as property is "a right to the entire or partial use, occupation, or enjoy- "ment of some specific thing, *it may be taken either by abro- "gating the right, or so dealing with the thing that the right "cannot be beneficially executed or enjoyed.* A man's property "is taken when his horse is carried away by a trespasser or "for the service of the government in time of war; but it is "also taken when his goods or chattels are forfeited for felony "or treason, as soon as the sentence is pronounced and be- "fore the writ is issued to carry it into effect. *So land may "be taken by acts done in pursuance of an authority conferred "by statutes and rendering it physically unfit for use or habita- "tion*, or by a statutory transfer of the title to commissioners "with an adequate provision for the assessment of the dama- "ges on the report of a jury of viewers, *although its physical "condition remains unchanged and it is not entered upon or oc- "cupied.* If the effect is produced, it matters not by what "means; and an act done off the land in question may be as "much within the above definition as if the land were occu- "pied. Backing the water of a stream which runs through "the complainant's premises, so as to impair its usefulness as "a water power, or flood the land, is consequently a taking, "whether the dam or embankment is built on the land or "lower down the stream; and so of the diversion of the "stream before it reaches the land."

Page 384 :—

"Cutting down trees or hedges, or excavating sand or "gravel, is a taking, and so is the damage caused by digging "so near another's line as to cause a caving in or subsidence "of the soil from its own weight, and not by reason of a "superadded pressure from above. The appropriate remedy "in the former instance is trespass, and in the latter an in- "junction or action on the case; but this does not affect the "principle, which depends on the effect produced and not on "the means, and is equally applicable whether the injury

" results from act done on the complainant's land or elsewhere. " *Such is the rule as between individuals, and the only difference* " *where the act is done under an authority conferred by the State* " *for a public purpose, is that the recovery must be limited to* " *compensation.*"

Page 385 :—

" IT IS ESTABLISHED IN CONFORMITY TO THESE PRINCIPLES, " THAT ANY PHYSICAL INJURY TO LAND BY REASON OF THE EREC- " TION, CONSTRUCTION, OR OPERATION OF A PUBLIC WORK, " WHEREBY ITS APPROPRIATE USE IS HINDERED OR ITS VALUE " LESSENED, IS A TAKING WHICH ENTITLES THE OWNER TO " COMPENSATION TO THE EXTENT OF THE LOSS THEREBY " OCCASIONED, ALTHOUGH THE INJURY IS CONSEQUENTIAL AND " THE LAND NOT ENTERED UPON OR OCCUPIED."

That which would be a deprivation if done for private use must be attended with compensation though done for a public end.

In *Richardson* vs. *Vermont Central Rd. Co.*, 25 Vt., 465, 471, Bennett, J., says :—

" In the case before us the plaintiffs' soil has slidden into " the ditch, and though damages may be small, still the in- " quiry is, Have the plaintiffs sustained an actionable injury? " It should be remarked that they have not laid upon the soil " any additional or artificial weight which facilitated the *slide;* " but it was purely the result of the defendants' own act."

Page 472 :—

" If, then, the defendants stood as an individual, owning the " adjoining fee, we think they could not defend successfully " this part of the claim for damages."

In Crawford *vs.* Delaware, 7 Ohio St. Rep., 459, 470. Change of grade of a street after its establishment is as direct an invasion of private right to a lot as if the erections upon the lot were taken for public use. " It comes not within the " letter, but manifestly within the spirit, of the provisions of " the Constitution, which requires compensation for property " taken for public use."

In *Stone* vs. *Fairbury, Pontiac, N. R. & Co., 68 Ills., 394,* which was an action on the case by the appellant against the

appellee to recover damages to plaintiff's property caused by the construction and operation of defendant's railroad on a public street in front of the same. Mr. Justice Craig, delivering the opinion of the court, says, page 398 :—

"Under the Massachusetts statute, which is somewhat anal-
"ogous to our Constitution, the court seems to lay down the
"rule that the damage, in order to enable a recovery, must be
"a direct physical injury, which is no doubt the proper rule.
"* * * As we understand the averments, they are in substance
"that smoke and cinders were thrown from the engines of the
"defendant on the property of the plaintiff, by means whereof
"his property was greatly damaged. If this be true, and the
"averments are to be so taken, the plaintiff has sustained a
"direct and physical injury to his property, for which he is
"entitled to recover."

In *Rigney* vs. *Chicago*, 102 Ills., 64, which was an action for depriving plaintiff of access to his house by cutting off an intersecting street with the one on which plaintiff fronted.

It is ruled under the Constitution of Illinois of 1870, which ordains that "private property shall not be taken or damaged "for public use without just compensation" that plaintiff should recover.

Mr. Justice Mulkey, page 80, says :—

"In all cases, to warrant a recovery, it must appear there
"has been some direct physical disturbance of a right, either
"public or private, which the plaintiff enjoys in connection
"with his property and which gives to it an additional value,
"and that by reason of such disturbance he has sustained a
"special damage with respect to his property in excess of
"that sustained by the public generally. *In the absence of any*
"statutory or constitutional provisions on the subject, the common
"law affords redress in all such cases, and we have no doubt it
"was the intention of the framers of the present constitution to
"require compensation to be made in all cases, where, but for
"some legislative enactment, an action would lie by the common
"law."

In discussing what is a "physical injury" the same justice says, page 77: "The meaning, therefore, of the expression

"'*physical* injury' when used in connection with the term "property, would in any case necessarily depend upon "whether the term property was used in the one sense or the "other" (*i. e.*, the thing or the use of the thing). "To illus- "trate, if the lot and buildings of appellant are to be re- "garded as property, and not merely the subject of property, "as strictly speaking they are, then there has clearly been no "physical injury to it; but if by property is meant the right "of user, enjoyment, and disposition of the lot and buildings, "then it is evident there has been a direct physical inter- "ference with appellants' property, and when considered from "this aspect, it may appropriately be said the injury to the "property is direct and physical."

Mr. Chief Justice Dickey delivered a concurring opinion in which he said, page 84: "*The right of action does not depend "upon the distance between the lot and the improvement. This "depends upon the nature and character of the improvement, "and upon the question whether the property of claimant is "materially damaged in fact.*"

THE RIGHT TO COMPENSATION WOULD EXIST IF THERE WERE NO CONSTITUTIONAL GUARANTIES.

In *Charles River Bridge* vs. *Warren Bridge*, 11 Peters, 420, *Judge Story* says (page 638):—

"We have been told, indeed, that where the damage is "merely *consequential*, the Constitution does not entitle the "party to compensation, and Thurston *vs.* Hancock, 12 Mass. "R., 220, and Callender *vs.* Marsh, 1 Pick. R., 418, are cited "in support of the doctrine. With all possible respect for the "opinions of others, I confess myself to be among those who "never could comprehend the law of either of those cases, and "I humbly continue to doubt if upon principle or authority "they are easily maintainable." * * *

"Suppose a man is the owner of a mill, and the legislature "authorizes a diversion of the water-course which supplies it, "whereby the mill is injured or ruined, are we to be told that "this is a consequential injury, and not within the scope of "the Constitution? *If not within the scope of the Constitution, "it is, according to the fundamental principles of a free govern-*

"*ment, a violation of private rights, which cannot be taken away* "*without compensation.* The case of Gardner *vs.* The Village "of Newburgh, 2 John. Ch. R., 139, would be a sufficient "authority to sustain this reasoning, IF IT DID NOT STAND "UPON ETERNAL PRINCIPLES OF JUSTICE, RECOGNIZED BY EVERY "GOVERNMENT WHICH IS NOT A PURE DESPOTISM."

In *West River Bridge Co.* vs. *Dix*, 6 Howard, 507.

Mr. Justice Woodbury, referring to the obligation to make compensation for injuries done through the exercise of the power of eminent domain, says (page 540): "But compensa- "tion from the public in such cases prevails generally in "modern times, and certainly seems to equalize better the "burden. * * *

"Nor shall I stop to discuss whether it is in this principle "that private property has always been taken for highways in "England on making compensation, so as to be a precedent "for us. This was done there formerly, not as here, but by a "writ *ad quod damnum*, and it was for ages issued before the "grant of any new franchise by the King, whether a road, "ferry, or market; and the inquiry related to the damage by "it, whether to the public or individuals. Fitz, N. B., 221; 3 Bac. "Abr., Highways A. Nor were alterations in roads, or even "the widening or discontinuing of them, allowed without. "*Thomas* vs. *Sorrell*, Vaughn 314, 348, 349; Cooke Ch., 267; "6 Barn. & Ald., 566."

In *Fletcher* vs. *Peck*, 6 Cranch, 87, *Johnson, J.*, page 147, says:—

"I do not hesitate to declare that a State does not possess "the power of revoking its own grants. But I do it on a "general principle, on the reason and nature of things, a prin- "ciple which will impose laws even on the diety." * * * Page 145.

"To give it (obligation of contracts), the general effect a "restriction of the State powers in favor of private rights, is "certainly going very far beyond the obvious and necessary "import of the words, and would operate to restrict the States "in the exercise of that right which every community must "exercise of possessing itself of the property of the individual,

"when necessary for public uses; a right which a magnan-
"imous and just government will never exercise, without
"amply indemnifying the individual, *and which perhaps amounts*
"*to nothing more than a power to oblige him to sell and convey*
"*when the public necessities require it.*"

In *Columbia Bridge Co.* vs. *Geisse*, 35, N. J. L., 558, it was ruled that where a statute of New Jersey required compensation to be made to "those that may be injured," that it included any injuries actionable at common law.

The evidence in this case (printed record, pages 13, 14, 15) shows that the plaintiff's dwelling-house was so jarred and shaken by the frequently-passing trains and locomotives as to render the house uninhabitable, and the noise rendered continuous sleep impossible, to say nothing of the cinders and soot which every minute of the day and night were showered upon him. He was literally and actually driven from his home, and to say he was not "deprived" of it seems like a refinement of cruelty. Under principle and authority, then, if he had suffered such injuries at the hand of any fellow-citizen, could there be any doubt of his sustaining an action against such a wrongdoer? If this must be answered in the affirmative, then why should not the delegates of the State power of eminent domain be equally liable? What safer or wiser definition of what is a deprivation of property by a State exercising its power of eminent domain can there be than to hold that one is deprived of property when he has suffered an injury to it which would support a common-law action? There is nothing fanciful in such a rule, and nothing unjust. Neither is it novel. It is recognized as a rule of liability from one end of this land to the other between natural persons. Why should it not be equally applicable to artificial persons? We submit that there is no good reason why the delegates of the State's power of eminent domain, who embark in public enterprises for private profit, should not be placed on the same plane of responsibility for their acts as are private citizens, save and except only they should be required to make but one compensation as the price they should pay for the privilege of inflicting the injury for all time. Such

course could do no harm to promoters of public improvements, because the compensation they would be called upon to pay would be ultimately paid by the public who made use of the improvement, and thus the burden would be borne by the community, with a reasonable approximation to equality, which is the equitable doctrine at the base of the distribution of all public burdens. On the other hand, to deny such right to compensation, leaves the party thus injured remediless, and takes his property for benefit of the promoters of the public improvements, who reap their profits off the public without having to bear their just burdens.

This court has already announced in the Baltimore and Potomac Railroad *vs.* Fifth Baptist Church, *supra*, that such injuries as the plaintiff has suffered in this case would sustain an action. The exercise by a State of its power of eminent domain in depriving a citizen of his property for public use, and the refusal to make compensation, we submit, necessarily requires a definition of what is a deprivation of property of the citizen by a State within the prohibition of the fourteenth amendment to the Constitution of the United States. And this in turn entails the determination of what is appropriated for public use when the State authorizes the construction of a public improvement. In some of the States it was held that the State was bound to pay for only so much of the land as it seized, and in estimating the damage no allowance was to be made for the damage done to the remainder. This was found to work such gross injustice that in most of the States the rule is that the damage consequential upon the taking is allowed to be recovered, and this has ever been the rule in Pennsylvania, as the cases cited show. This right to recover consequential damage was confined, however, to where there had been an actual seizure of a parcel of land, it matters not how little. It was to extend this rule of damage, as heretofore shown, to property in the vicinity of public works that the words "injured or destroyed" were added by the people to the constitutional limitations adopted in 1873. We think a proper determination of what was appropriated for public use would at all times have included the plaintiff's property